Petition

81-1214

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ALEXANDER L. STEVAS,
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF MISSOURI,
Petitioner,

v.

DANNY HUNTER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

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QUESTIONS PRESENTED

1. Whether the double jeopardy clause of the Fifth Amendment to the United States Constitution is violated by convicting a defendant, in one proceeding, of both armed criminal actions, § 559.225, RSMo Supp. 1976, and its predicate felony, where the proof required to establish a violation of the latter is necessarily required to prove a violation of the former?

2. Whether the Missouri Court of Appeals, Western District, is bound by *Brintley* v. *Michigan*, 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979), a decision of this Court dismissing an appeal (wherein the same federal constitutional issue was raised) for want of a substantial federal question?

3. Whether the Missouri Supreme Court's most recent decision in *State* v. *Haggard*, 619 S.W.2d 44 (Mo. banc 1981), wherein that court held that convicting a defendant in a single proceeding of both first degree robbery and armed criminal action violates the double jeopardy clause of the Fifth Amendment to the United States Constitution, conflicts with this Court's decision in *Brintley* v. *Michigan*, 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979); therein this Court dismissed, for want of a substantial federal question, an appeal which sought to review the Michigan Supreme Court's decision holding that the double jeopardy clause of the Fifth Amendment to the United States Constitution was not violated by convicting a defendant in a single proceeding of both armed robbery, § 750.529, M.C.L.A., and possession of a firearm during the commission of a felony, § 750.227(b), M.C.L.A.

4. Whether the Missouri Supreme Court's most recent decision in *State* v. *Haggard*, 619 S.W.2d 44 (Mo. banc

1981), conflicts with this Court's decisions rendered in *Whalen* v. *United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), and *Albernaz* v. *United States*, 450 U.S. ____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981)?

5. Whether the decision of the Missouri Court of Appeals, Western District, in *State* v. *Hunter*, 622 S.W.2d 324 (Mo.App., W.D. 1981), which relied on *State* v. *Haggard*, 619 S.W2.d 44 (Mo. banc 1981), conflicts with this Court's recent decision in *Albernaz* v. *United States*, 450 U.S. ____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981)?

6. Whether the decision of the Missouri Court of Appeals, Western District, in *State* v. *Hunter*, 622 S.W.2d 324 (Mo.App., W.D. 1981), which relied on *State* v. *Haggard*, 619 S.W.2d 44 (Mo. banc *Missouri* v. *Counselman*, No. 80-754, ____ U.S. ____, 101 S.Ct. 1690, 68 L.Ed.2d 190 (1981); *Missouri* v. *Brown*, No. 80-1368, ____ U.S. ____, 101 S.Ct. 1735, 68 L.Ed.2d 222 (1981); *Missouri* v. *Greer*, No. 80-997, ____ U.S. ____, 101 S.Ct. 3000, 69 L.Ed.2d 385 (1981); *Missouri* v. *Sinclair*, No. 80-1166, ____ U.S. ____, 101 S.Ct. 3044, 69 L.Ed.2d 415 (1981); *Missouri* v. *Lowery*, No. 80-1561, ____ U.S. ____, 101 S.Ct. 3044, 69 L.Ed.2d 415 (1981); and *Missouri* v. *Crews*, No. 80-1393, ____ U.S. ____, 101 S.Ct. 3103, 69 L.Ed.2d 968 (1981)?

PARTIES

In the Missouri Court of Appeals, Western District, the parties were as follows:

State of Missouri, respondent, and Danny Hunter, appellant, in cause No. WD 31,547.

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PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

PETITION FOR CERTIORARI

The petitioner, State of Missouri, respectfully requests that a writ of certiorari issue to review the judgment of the Missouri Court of Appeals, Western District, in the case styled *State of Missouri* v. *Danny Hunter,* No. WD 31,547.

OPINION BELOW

The opinion of the Missouri Court of Appeals, Western District in the cause styled *State of Missouri* v. *Danny Hunter,* No. WD 31,547, the case for which the writ of certiorari is being sought, was filed on August 18, 1981, and has been reprinted in Appendix A-1. It recently has been published at *State* v. *Hunter,* 622 S.W.2d 324 (Mo. App., W.D. 1981).

JURISDICTIONAL STATEMENT

In *State* v. *Hunter,* No. WD 31,547, the opinion of the Missouri Court of Appeals, Western District, was filed on August 18, 1981. The opinion affirmed Hunter's convictions for robbery in the first degree [§ 560.120, RSMo 1969; § 560.135, RSMo Supp. 1975] and assault with intent to do great bodily harm with malice aforethought [§ 559.180 RSMo 1969], and consecutive sentences of ten and five years imprisonment, respectively, but vacated his conviction and 15-year sentence for armed criminal action [§ 559.225, RSMo 1976 Supp.]. The State's timely alternative motion for rehearing or transfer to the Missouri Supreme Court was overruled by the Court of Appeals on September 15, 1981. Thereafter, the State's timely application to transfer to the Missouri Supreme Court was denied by that court on November 10, 1981. The order denying the application is reprinted in Appendix A-2 immediately following the opinion in this cause.

The present petition has been filed within 60 days after the final judgment in this case, and this Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment, reads as follows:

> "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against him-

self, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

STATUTES INVOLVED

Sections 560.120, RSMo 1969; 560.135, RSMo Supp. 1975; and 559.225, RSMo Supp. 1976, are set forth in Appendix B. Sections 750.227(b) and 750.529, M.C.L.A., are set forth in Appendix C.

STATEMENT OF THE CASE

On August 18, 1981, the Missouri Court of Appeals, Western District, affirmed the respondent's conviction and consecutive sentences of ten and fifteen years, respectively, for robbery in the first degree [§ 560.120, RSMo 1969; § 560.135, RSMo Supp. 1975], and assault with intent to do great bodily harm with malice aforethought [§ 559.180, RSMo 1969], but reversed the respondent's conviction and 15-year sentence for armed criminal action [§ 559.225, RSMo Supp. 1976], on the ground that convictions for both armed criminal action (use of a deadly weapon in the commission of a felony) and the predicate felony (in this case, robbery in the first degree) violated the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. *State* v. *Hunter*, 622 S.W.2d 374, 375[1] (Mo.App., W.D. 1981). In reaching this conclusion, the court relied on the most recent ruling of the Missouri Supreme Court on this issue, which was pronounced in *State* v. *Haggard*, 619 S.W.2d 44 (Mo. banc 1981). *State* v. *Hunter, supra*, 622 S.W.2d at 375.

A joint petition for a writ of certiorari is presently pending before this Court as a result of the *Haggard* decision. *Missouri* v. *Haggard*, No. 81-625 (petition for certiorari filed Sept. 24, 1981). This petition also joins,

pursuant to Rule 19.4, 22 other cases which were decided by the Missouri Supreme Court contemporaneously with its decision in *State* v. *Haggard, supra.* In addition to the petition filed by the State of Missouri in *Missouri* v. *Haggard,* the State has filed another petition with this Court, involving the same issue, in the cause styled *Wyrick* v. *Williams,* No. 80-2200 (petition for certiorari filed June 29, 1981).

In each of the cases involved in these petitions, the defendant's conviction for armed criminal action was set aside on the ground that multiple convictions for both armed criminal action *and* the underlying or predicate felony constituted multiple punishment for the same offense in violation of the Fifth Amendment's prohibition against double jeopardy.

This petition, then, is brought as the result of the continuing controversy between the Missouri Supreme Court and the State of Missouri over the application of the Double Jeopardy Clause to the prosecution and conviction of criminal defendants in Missouri for both armed criminal action, § 559.225, RSMo Supp. 1976, and, in the same trial, for the felony used to prove the armed criminal action charge (in this case, robbery in the first degree).

When this issue first arose several years ago, the Missouri Supreme Court took the position that multiple convictions for both armed criminal action and the underlying felony did not violate the Fifth Amendment's prohibition against double jeopardy. *State* v. *Treadway,* 558 S.W.2d 646 (Mo. banc 1977), *cert. denied,* 439 U.S. 838, 99 S.Ct. 124, 58 L.Ed.2d 135 (1978); *State* v. *Valentine,* 584 S.W.2d 92, 96 (Mo. banc 1979). However, in *Sours* v. *State,* 593 S.W.2d 208 (Mo. banc 1980), the Missouri Supreme Court expressly overruled *Treadway* and *Valentine* and concluded that the Fifth Amendment's prohibi-

tion against double jeopardy, insofar as it precluded multiple punishments for the same offense, prevented the State of Missouri from convicting and sentencing a criminal defendant for both armed criminal action *and* the underlying felony, on the theory that the underlying felony, by definition, because an "element" of the armed criminal action offense and therefore was a lesser-included offense of armed criminal action. *Sours* v. *State, supra,* 593 S.W.2d at 214.

The court in *Sours* stated that the test for determining whether two offenses are the "same offense" for double jeopardy purposes was the test enunciated in *Blockburger* v. *United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932), *i.e.,* whether "each provision requires proof of a fact which the other does not." *Id.,* 593 S.W.2d at 213. Since the offense of armed criminal action, in effect, "swallows up" the underlying felony by making it a necessary element of the offense, the Missouri Supreme Court reasoned that *Blockburger* dictated the conclusion that a defendant could not be convicted and punished for both armed criminal action *and* the underlying felony, because the underlying felony would never require proof of any element that armed criminal action did not. *Sours* v. *State, supra,* 593 S.W.2d at 222-223.

In response to the State of Missouri's petition for writ of certiorari, the decision of the Missouri Supreme Court in *Sours* (hereinafter referred to as *Sours I*) was vacated by this Court on May 27, 1980, for reconsideration in light of *Whalen* v. *United States,* 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). *Missouri* v. *Sours,* 446 U.S. 962, 100 S.Ct. 2935, 64 L.Ed.2d 820 (1980). In *Whalen,* this Court concluded that multiple punishments could be imposed for the same offense "without running afoul of the

double jeopardy guarantee of the Constitution" where specifically authorized by statute, *Whalen* v. *United States*, 100 S.Ct. at 1436, and further stated that the rule in *Blockburger* was "a rule of statutory construction." *Id.*, 100 S.Ct. at 1438. Accordingly, this Court in *Whalen* held that "'where the offenses are the same under [the *Blockburger*] test, cumulative sentences are not permitted, *unless elsewhere specifically authorized by Congress.*" (Emphasis added.) *Id.*, 100 S.Ct. at 1439.

Notwithstanding this language, the Missouri Supreme Court on remand in *Sours* reiterated its original conclusion that *Blockburger* was not a rule of statutory construction but rather was a rule of substantive constitutional law. *Sours* v. *State*, 603 S.W.2d 592, 605-606 (Mo. banc 1980). The Missouri Supreme Court stated that it was willing to "collapse the constitutional question into the question of legislative intent", *Sours* v. *State*, *supra*, 603 S.W.2d at 595 n.3, and subsequently stated:

> "If the vacation of our prior judgment and the remand of the case for reconsideration in light of *Whalen* was intended to lead this Court to adopt the view that the General Assembly is free to impose separate punishments for two crimes that constitute the same offense under the traditional same evidence test, we are unable to so read *Whalen* and we are not prepared to take that step. . . . If such a ruling is to be made, it is the responsibility of the United States Supreme Court to make it." *Id.*, 603 S.W.2d at 606.

On January 26, 1981, the State of Missouri's petition for writ of certiorari was denied. *Missouri* v. *Sours*, ____ U.S. ____, 101 S.Ct. 953, 67 L.Ed.2d 118 (1981). The order of denial indicated that two of the justices, Justice Black-

mun and Justice Rehnquist, "would dismiss the petition for a writ of certiorari as moot." *Id.*, 101 S.Ct. at 593.[1]

Subsequent to the Missouri Supreme Court's decision on remand in *Sours* (hereinafter referred to as *Sours II*), the Missouri Supreme Court, as well as the three districts of the Missouri Court of Appeals, began reversing convictions for armed criminal action in a number of cases because of the double jeopardy question, and the State of Missouri, in most instances, sought review by certiorari from this Court. In response to those petitions, this Court repeatedly granted certiorari and vacated decisions that had reversed convictions for armed criminal action on the basis of *Sours II*. *Missouri* v. *Counselman*, ____ U.S. ____, 101 S.Ct. 1690, 68 L.Ed.2d 190 (1981); *Missouri* v. *Brown*, ____ U.S. ____, 101 S.Ct. 1735, 68 L.Ed.2d 222 (1981); *Missouri* v. *Greer*, ____ U.S. ____, 101 S.Ct. 3000, 69 L.Ed.2d 385, (1981); *Missouri* v. *Sinclair*, ____ U.S. ____, 101 S.Ct. 3044, 69 L.Ed.2d 415 (1981); *Missouri* v. *Lowery*, ____ U.S.____, 101 S.Ct. 3044, 69 L.Ed.2d 415 (1981); and *Missouri* v. *Crews*, ____ U.S. ____, 101 S.Ct. 3103, 69 L.Ed.2d 968 (1981). The orders from this Court in every case read substantially the same. In *Missouri* v. *Counselman, supra,* the order read in pertinent part as follows:

> " . . . The petition for writ of certiorari is granted. The judgments are vacated and the case is remanded to the Court of Appeals of Missouri, Eastern District,

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[1]While this Court gave no reason for denying the petition for writ of certiorari, it is reasonable to assume that the denial resulted from the fact that counsel for respondent Sours had informed this Court that his client had finished serving his sentences for both the armed criminal action conviction *and* the underlying felony, and that "therefore the case [wa]s essentially moot insofar as the respondent [wa]s concerned and in reality no controversy exist[ed] between the two parties." (Res.Br. in Opp. to Cert., in *State* v. *William Scott Sours*, No. 80-571, at 6.)

for further consideration in light of *Albernaz* v. *United States*, 450 U.S. ____, 1981.

Justice Stewart, Justice Marshall, and Justice Stevens dissent."

Missouri v. *Counselman, supra*, 101 S.Ct. at 1690.

On the same day that this Court vacated the judgments in *Counselman*, this Court also considered cases involving identical issues from Delaware and Maryland. This Court reversed two Delaware cases where the Delaware Supreme Court, under virtually identical circumstances, had held that multiple convictions and punishments for both armed robbery and a felony firearms offense, stemming from the same transaction, constituted double jeopardy. *Delaware* v. *Hunter*, ____ U.S. ____, 101 S.Ct. 1689, 68 L.Ed.2d 190 (1981); *Delaware* v. *Evans*, ____ U.S. ____, 101 S.Ct. 1689, 68 L.Ed.2d 190 (1981). This Court left standing a Maryland defendant's multiple convictions and sentences for armed robbery and a felony firearms offense by dismissing his appeal "for want of jurisdiction" and by denying his petition for writ of certiorari. *Whack* v. *Maryland*, ____ U.S. ____, 101 S.Ct. 1688, 68 L.Ed.2d 189 (1981).

In view of these developments, the Missouri Supreme Court granted a rehearing in the case of *State* v. *Haggard, supra*, to reconsider its decisions in *Sours I* and *II* on the basis of *Albernaz* v. *United States*, 450 U.S. ____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981), a case decided concurrently with the orders issued in *Counselman, Hunter, Evans* and *Whack*.

On July 14, 1981, the Missouri Supreme Court reexamined its prior decisions in *Sours I* and *Sours II* and held that *Albernaz* did not require that its prior decisions in *Sours I* and *Sours II* be overturned. The court stated:

> "... [W]e are again compelled to affirm our prior position, as expressed in *Sours II,* and hold that by enactment of these two statutes the Missouri legislature intended to twice punish the appellant, and that such multiple punishments for the same offense arising out of the same transaction violates the Fifth Amendment to the United States Constitution. Until such time as the Supreme Court of the United States declares clearly and unequivocally that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution does not apply to the legislative branch of government, we can do other than what we percieve to be our duty to refuse to enforce multiple punishments for the same offense arising out of the single transaction."

State v. *Haggard, supra,* 619 S.W.2d at 51.

As previously noted, a petition for writ of certiorari is now pending before this Court as a result of the *Haggard* decision. The petition filed by the state of Missouri in the instant case stems from the subsequent decision of Missouri Court of Appeals, Western District, vacating the respondent's conviction for armed criminal action as a result of the Missouri Supreme Court's opinion in *Haggard.* See *State* v. *Hunter, supra,* 622 S.W.2d at 375.

REASONS FOR GRANTING THE WRIT

The petitioner submits that a writ of certiorari should issue in this case because the holding of the Missouri Court of Appeals, Western District, in *State* v. *Hunter,* 622 S.W.2d 374 (Mo.App., W.D. 1981), is in direct and irreconcilable conflict with recent decisions of this Court, particularly *Albernez* v. *United States,* 450 U.S. ____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981).

The decision of the Court of Appeals in this case was

based solely on a prior decision of the Missouri Supreme Court in *State* v. *Haggard*, 619 S.W.2d 44 (Mo. banc 1981). As noted by the petitioner under the previous section of this petition, a petition for writ of certiorari in *Haggard* is presently pending before this Court. *Missouri* v. *Haggard*, No. 81-625 (petition for certiorari filed Sept. 24, 1981). In *Haggard*, the Missouri Supreme Court held that, notwithstanding *Albernaz* v. *United States, supra*, and notwithstanding the clear legislative intent to the contrary, multiple convictions for both armed criminal action *and* the predicate felony violated the Fifth Amendment's prohibition against multiple punishment for the same offense. *State* v. *Haggard, supra*, 619 S.W.2d at 51.

During the May 27, 1981, oral argument held before the Missouri Supreme Court, *en banc*, in connection with *State* v. *Haggard, supra*, the petitioner argued that any questions which might not have been answered by this Court in *Brintley* v. *Michigan*, 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979), *Whalen* v. *United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), and *United States* v. *DiFrancesco*, ____ U.S. ____, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980), were definitively resolved by this Court's decision in *Albernaz* v. *United States, supra*. Specifically, the petitioner argued that because the Missouri Supreme Court had stated in unequivocal terms that the Missouri legislature clearly intended that punishment be imposed for *both* armed criminal action and its predicate felony, *Albernaz* disposed of the double jeopardy issue, since it held that:

> ". . . The question of what punishments are constitutionally permissible is not different from what punishment the legislative branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishment, imposition of such sen-

tences does not violate the constitution." (footnote omitted.)

Albernaz v. *United States, supra,* 101 S.Ct. at 1145.

However, the Missouri Supreme Court remained unconvinced or, as that court intimated, confused. The court opined as follows:

> "Having traversed the almost identical stormy course as that of our brothers in Delaware, we too perceive ourselves sailing toward the 'Sargasso Sea' mentioned in *Albernaz* and described in *Hunter* v. *Delaware,* 430 A.2d 426 (Del. 1981)." (footnote omitted).

State v. *Haggard, supra,* 619 S.W.2d at 49-50.

Instead of applying what the petitioner argued was the plain meaning of this Court's decision in *Albernaz,* the Missouri Supreme Court attempted to distinguish *Albernaz:*

> "Our reading of *Albernaz* persuades us that the United States Supreme Court was dealing with two separate crimes each involving proof of an element different from and not included in the other. Our case and its predecessors, *Sours I* and *Sours II,* are distinguishable from *Albernaz* for the reason that having proved every fact and element necessary to prove robbery with a dangerous and deadly weapon, you have proved every element and every fact required for proof of armed criminal action. We are in complete agreement with the *Hunter* court that "the definitive ultimate and penultimate sentences of *Albernaz* are *dicta,* unnecessary to reach the Court's conclusion in that case; . . .' 430 A.2d at 480 (emphasis in original)."

State v. *Haggard, supra,* 619 S.W.2d at 50.

Having thus "distinguished" *Albernaz*, the Missouri Supreme Court subsequently went on to hold that, even though the Missouri legislature "intended to twice punish the appellant," such punishment were proscribed by the Double Jeopardy Clause of the Fifth Amendment, notwithstanding such legislative intent and notwithstanding this Court's opinion in *Albernaz*. *State* v. *Haggard*, *supra*, 619 S.W.2d at 51.

This decision provoked a sharp dissenting opinion from Judge Rendlen, who denounced what he called the majority's "adamant refusal" to follow the controlling decisions of this Court. *State* v. *Haggard*, *supra*, 619 S.W.2d at 51 (Rendlen, J., dissenting). Judge Rendlen later characterized the decision as a "cavalier evasion" of the principles enunciated in *Whalen* v. *United States*, *supra*, and *Albernaz* v. *United States*, *supra*. *State* v. *Haggard*, *supra*, 619 S.W.2d at 55 (Rendlen, J., dissenting).

Such strong language is certainly justified by the Missouri Supreme Court's stubborn refusal to follow the controlling decisions of this Court, particularly *Brintley* v. *Michigan*, *supra*, *Whalen* and *Albernaz*.

Throughout the court of the litigation involving this question, the majority opinions of the Missouri Supreme Court have repeatedly ignored and refused to recognize this Court's decision in *Brintley* v. *Michigan*, *supra*. In *Brintley* this Court dismissed for want of a substantial federal question, the defendant's appeal from his multiple convictions for armed robbery and a felony firearms violation, which were affirmed by a Michigan Supreme Court in *People* v. *Brintley*, 406 Mich. 374, 280 N.W.2d 793 (1979). The defendant, like the respondent in the case at bar, argued that his multiple convictions for armed robbery and a felony firearms violation violated the Fifth Amendment's prohibition against multiple punishments for the

same offense, a claim that was summarily rejected by this Court "for want of a substantial federal question." *Brintley* v. *Michigan, supra,* 100 S.Ct. at 418. Such a disposition rejects the specific challenges presented in the statement of jurisdiction and leaves undisturbed the original judgment appealed from. *Mandel* v. *Bradley,* 432 U.S. 173, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977); *Hicks* v. *Miranda,* 422 U.S. 332, 343-345, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975). Although the Michigan statute (which is set out in Appendix C of this petition) differed slightly from Missouri's armed criminal action statute, the constitutional issue raised was identical, and therefore this Court's summary affirmance was binding upon the Missouri Supreme Court. *Hicks* v. *Miranda, supra,* 422 U.S. at 344-345. Nevertheless, the Supreme Court, in deciding *Sours* v. *State,* 593 S.W.2d 208 (Mo. banc 1980) (*Sours I*), while recognizing that Michigan had reached a contrary result, *id.,* 593 S.W.2d at 217, simply ignored this Court's summary affirmance of that decision.

Thus, even though this Court had held by its summary affirmance in *Brintley,* that a conviction for both a felony firearms violation such as Missouri's armed criminal action statute, § 559.225, RSMo Supp. 1976, and its predicate or underlying felony, did not violate the Fifth Amendment's prohibition against multiple punishments for the same offense, the Missouri Supreme Court in *Sours I* reached a decision to the contrary. *Sours* v. *State, supra,* 593 S.W.2d at 222-223.

This decision was, of course, set aside by this Court on May 27, 1980, for reconsideration in light of *Whalen* v. *United States, supra. Missouri* v. *Sours,* 446 U.S. 962, 100 S.Ct. 2935 64 L.Ed.2d 820 (1980). In *Whalen* this Court concluded that multiple punishments could be imposed for the same offense "without running afoul of the double

jeopardy guarantee of the Constitution" where specifically authorized by statute, *Whalen* v. *United States, supra,* 100 S.Ct. 1436, and further stated that the rule enunciated in *Blockburger* v. *United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932), was simply "a rule of statutory construction." *Id.,* 100 S.Ct. at 1438. Accordingly, this Court held in *Whalen* that "where the offenses are the same under [the *Blockburger*] test, cumulative sentences are not permitted, *unless elsewhere specifically authorized by Congress.*" *Id.,* 100 S.Ct. at 1439. (emphasis added.)

Despite this language, the Missouri Supreme Court on remand reiterated its original conclusion that *Blockburger* was not a rule of statutory construction but rather was a rule of substantive constitutional law. *Sours* v. *State,* 603 S.W.2d 592, 605-606 (Mo. banc 1980). The Missouri Supreme Court stated that it was unwilling to "collapse the constitutional question into the question of legislative intent", *Sours* v. *State, supra,* 603 S.W.2d at 595 n. 3, and subsequently reaffirmed its original opinion in *Sours I.*

On January 26, 1981, the State of Missouri's petition for writ of certiorari was denied. *Missouri* v. *Sours,* ____ U.S. ____, 101 S.Ct. 953, 67 L.Ed.2d 118 (1981). The order of denial indicated that two of the justices, Justice Blackmun and Justice Rehnquist, "would dismiss the petition for writ of certiorari as moot." *Id.,* 101 S.Ct. at 593. The possible mootness resulted from the fact that, prior to the disposition of the petition by this Court, Sours completed serving his sentence for both the armed criminal action charge *and* the underlying robbery. See Res.Br. in Opp. to Cert., in *State* v. *William Scott Sours,* No. 80-571, at 6.

Although it is reasonably certain that this Court's reluctance to entertain the State of Missouri's second petition in *Sours* stemmed from the fact that the case was, in all but a legal sense, moot, the Missouri Supreme Court in *State* v. *Haggard, supra,* purported to treat this Court's

denial of the second petition in *Sours* as approval of the position taken by that Court in *Sours II*. *State* v. *Haggard*, *supra*, 619 S.W.2d at 51. However, in view of this Court's opinion in *Albernaz* and its treatment of subsequent petitions for writs of certiorari filed by the State of Missouri challenging the reversal of armed criminal action convictions in reliance on *Sours II*, it is clear that such an interpretation is indefensible.

In *Albernaz* v. *United States*, *supra*, this Court finally cleared up much of the confusion surrounding the scope of the Double Jeopardy Clause insofar as it protects against multiple punishments for the "same offense". In *Albernaz*, the defendants were convicted, in a single proceeding, of conspiracy to import marijuana and conspiracy to distribute marijuana and received consecutive sentences on each count. Both convictions stemmed from a single agreement, the objectives of which were to import marijuana and then to distribute it domestically. The defendants argued that Congress had not intended multiple punishments to be imposed in a situation such as theirs and that, even if it had such an intent, the Double Jeopardy Clause of the Fifth Amendment prohibited the imposition of such punishment.

In rejecting both arguments, this Court emphasized, just as it previously had done in *Whalen* v. *United States*, *supra*, 100 S.Ct. at 1438, that the *Blockburger* test, which was treated as a matter of substantive constitutional law in *Sours I* and *II*, was actually nothing more than "'a rule of statutory construction", which, "because it serves as a means of discerning congressional purpose should not be controlling where, for example, there is a clear indication of contrary legislative intent." *Albernaz* v. *United States*, *supra*, 101 S.Ct. at 1143. The court then held that the defendants' convictions for conspiracy to import marijuana and conspiracy to distribute marijuana

were not the "same offense" under *Blockburger* because each offense required proof of an element that the other did not, *and* because the court could find no evidence of a legislative intent "contrary to the presumption which should be accorded to th[o]se statutes after application of the *Blockburger* test." *Albernaz* v. *United States, supra,* 101 S.Ct. 1137.

Having found, therefore, congressional intent to punish for both offenses, this Court then turned to the defendant's double jeopardy argument. The defendant contended that, notwithstanding the existence of legislative intent to punish for both offenses, the multiple punishments they received violated the Double Jeopardy Clause of the Fifth Amendment. Although this Court reaffirmed its previous rulings that the Double Jeopardy Clause protects against, *inter alia*, " 'multiple punishments for the same offense' ", *Albernaz* v. *United States, supra,* 101 S.Ct. at 1145, this Court rejected the defendants' double jeopardy argument in the following language:

> "Last Term in *Whalen* v. *United States,* this Court stated that 'the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishment the Legislative Branch has authorized.' 445 U.S., at 688; *id.,* at 696 (White, J., concurring in part and concurring in the judgment); *id.,* at 696 (Blackmun, J., concurring in the judgment). In determining the permissibility of the imposition of cumulative punishment for the crime of rape and the crime of unintentional killing in the course of rape, the Court recognized that the 'dispositive question' was whether Congress intended to authorize separate punishments for the two crimes. *Id.,* at 689. This is so because the 'power to define criminal offenses and to prescribe punishments

to be imposed upon those found guilty of them, resides wholly with the Congress." *Ibid.* As we previously noted in *Brown* v. *Ohio, supra,* 'where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishment for the same offense.' 432 U.S., at 165. Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishment, imposition of such sentences does not violate the Constitution." (footnote omitted.) *Albernaz* v. *United States, supra,* 101 S.Ct. at 1145.

In a concurring opinion written by Justice Stewart, in which Justice Marshall and Stevens joined, Justice Stewart took issue with the majority's conclusion that Congress (or, presumably, a state legislature) could constitutionally provide for cumulative punishments even where the two crimes were the "same offense" under the *Blockburger* test. *Albernaz* v. *United States, supra,* 101 S.Ct. at 1145-1146 (Stewart, J., concurring). These three justices specifically objected to the court's statement that "the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed",[2] and the

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[2]This statement of law appears to have been borrowed verbatim from Justice Blackmuns conc'urring opinion in *Whalen* v. *United States, supra,* where he urged this Court to expressly hold that "the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed." *Id.,* 100 S.Ct. at 1432. Justice Blackmun reiterated this conclusion in his concurring opinion in *Busic* v. *United States,* 446 U.S. 398, 100 S.Ct. 1747, 1756, 64 L.Ed.2d 381 (1980) (Blackmun, J., concurring).

following sentence which stated that "[w]here Congress intended as it did here, to impose multiple punishment, imposition of such sentences does not violate the Constitution." *Id.*, 101 S.Ct. at 1145. These three concurring justices stated that "[t]hese statements are supported by neither precedent nor reasoning and are unnecessary to reach the Court's conclusion." *Id.*, 101 S.Ct. at 1145. The three concurring justices then added:

> "No matter how clearly it spoke, Congress could not constitutionally provide for cumulative punishments unless each statutory offense required a proof of a fact that the other did not, under the criteria of *Blockburger* v. *United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306." *Id.*, 101 S.Ct. at 1145-1146.

Consequently, the express language of the majority opinion, together with the vigorous objections of Justice Stewart and the two other concurring justices, leave no room for quibble: where, as here, the legislature has expressly authorized multiple punishments for both armed criminal action and the underlying felony, multiple punishments for both offenses are permissible under *Albernaz*, even if the two crimes would normally be considered the "same offense" under *Blockburger* for double jeopardy purposes.

As previously emphasized, *Sours I* and *II* were bottomed on the premise that the *Blockburger* test was a rule of substantive constitutional law and that if two offenses were the "same" under *Blockburger*, multiple punishments were prohibited by the Fifth Amendment. However, *Albernaz* expressly rejected that reasoning, holding that the *Blockburger* test is a " 'rule of statutory construction' " and that "because it serves as a means of discerning congressional purpose the rule should not be controlling

where, for example, there is a clear indication of contrary legislative intent." *Id.*, 101 S.Ct. at 1143.

The Missouri Supreme Court has, of course, repeatedly recognized that the Missouri legislature clearly intended that multiple punishments be imposed for both armed criminal action and the underlying or predicate felony. *Sours* v. *State, supra,* 593 S.W.2d at 216; *Sours* v. *State, supra,* 603 S.W.2d at 598-599; *State* v. *Haggard, supra,* 619 S.W.2d at 51. Such a conclusion is inescapable in view of the express language of the second sentence of § 559.225, RSMo Supp. 1976, which provides that the "punishment imposed pursuant to the subsection *shall be in addition to* and any punishment provided by law for the crime committed by, with, or through the use, assistance or aid of a dangerous or deadly weapon." (emphasis added.) Consequently, even if armed criminal action and the underlying felony would normally be presumed to be "the same offense" under the *Blockburger* test, this presumption would "not be controlling" here, since, as § 559.225 expressly states, and as the Missouri Supreme Court has repeatedly acknowledged, "there is a clear indication of contrary legislative intent." *Albernaz* v. *United States, supra,* 101 S.Ct. at 1143.

As previously noted, the Missouri Supreme Court in *Haggard* dismissed the controlling language of this Court's decision in *Albernaz* as "'*dicta*'". *State* v. *Haggard, supra,* 619 S.W.2d at 50. As a result, the Missouri Supreme Court in *Haggard* concluded that the reversal of its prior position was not mandated by *Albernaz.* The court then adhered to its original holding in *Sours I* and *Sours II* and concluded that multiple punishments for both armed criminal action and the underlying offense, arising out of the same transaction, violated the Fifth Amendment's prohibition against multiple punishment for the same offense. *State* v. *Haggard, supra,* 619 S.W.2d at 51. It is,

therefore, readily understandable why Judge Rendlen characterized this conclusion as "the majority's adamant refusal to follow the controlling law, most recently announced" by this Court in *Albernaz. State* v. *Haggard, supra,* 619 S.W.2d at 51 (Rendlen, J. dissenting). Indeed, the Missouri Supreme Court's ruling in *Haggard* not only ignored the holding in *Albernaz* (by characterizing it as " '*dicta*' ") but also failed to consider this Court's actions on March 23, 1981, the date this Court issued its rulings in *Albernaz, Missouri* v. *Counselman,* ____ U.S. ____, 101 S.Ct. 1690, 68 L.Ed.2d 190 (1981), *Delaware* v. *Hunter,* ____ U.S. ____, 101 S.Ct. 1689, 68 L.Ed.2d 190 (1981), *Delaware* v. *Evans,* ____ U.S. ____, 101 S.Ct. 1689, 68 L.Ed.2d 190 (L981), and *Whack* v. *Maryland,* ____ U.S. ____, 101 S.Ct. 1688, 68 L.Ed.2d 189 (1981).

In *Missouri* v. *Counselman, supra,* this Court, in a 6-to-3 decision, vacated opinions of the Missouri Court of Appeals which had relied on *Sours I* and *II* to reverse armed criminal action convictions, and remanded the cases to the Eastern District of the Court of Appeals "for furthere consideration in light of *Albernaz* v. *United States,* 450 U.S. ____, 1981." *Id.,* 101 S.Ct. at 1690. Obviously, if the majority of this Court in *Albernaz* had considered the dispositive language of *Albernaz* mere *dicta* which was not binding on the Missouri Supreme Court, these remands would have made little or no sense. Furthermore, it is significant that the three justices who concurred in *Albernaz*—Justice Stewart, Marshall and Stevens—dissented in *Counselman.*

Equally revealing is the fact that, on the same day that the opinions in *Counselman* were vacated, this Court also reversed two Delaware cases where the Delaware Supreme Court, under virtually identical circumstances, had held that multiple convictions and punishments for

both armed robbery and a felony firearms offense, stemming from the same transaction, constituted double jeopardy. *Delaware* v. *Hunter, supra,* 101 S.Ct. at 1689; *Delaware* v. *Evans, supra,* 101 S.Ct. at 1689. Justices Stewart, Marshall and Stevens again dissented in both cases. This Court also dismissed on March 23rd an appeal for want of jurisdiction or, in the alternative, denied certiorari, in a case from Maryland where the state court had held that multiple convictions and sentences for both armed robbery and a felony firearms offense had not constituted double jeopardy. *Whack* v. *Maryland, supra,* 101 S.Ct. at 1688. Again, Justices Stewart, Marshall and Stevens disagreed with the action of the majority; they would have "note[d] probable jurisdiction and [would have] set the case for oral argument." The effect of these rulings, issued on the same day and by the same 6-to-3 configuration of justices that was present in *Albernaz,* resulted in the vacation, on the basis of *Albernaz,* of those state court opinions which had reversed convictions for armed criminal action or felony firearms offenses on double jeopardy grounds, but left standing the lone decision (*Whack*), that had reached a contrary result, *i.e.*, holding that multiple convictions for both a felony firearms offense and the predicate felony did not constitute double jeopardy.

The significance of this action certainly was not lost on the Delaware Supreme Court. On May 12, 1981, the Delaware Court responded by recognizing the clear import of *Albernaz* and concluded that multiple punishments for both a felony firearms offense and the predicate felony imposed at a single criminal trial "does not violate the Double Jeopardy Clause of the Fifth Amendment." *Hunter* v. *State,* 430 A.2d 476, 481 (Del. 1981). See also, *Evans* v. *State,* 430 A.2d 481 (Del. 1981). While recognizing the alleged "frustration" of the Delaware Supreme Court in

Hunter, the Missouri Supreme Court in Haggard refused to recognize the propriety of *Hunter's* ultimate conclusion. *State* v. *Haggard, supra,* 619 S.W.2d at 50. Consequently, the Missouri Supreme Court remains the final holdout. Of the four states—Michigan, Maryland, Delaware and Missouri—which have litigated this issue before this Court in the last two years, only Missouri continues to hold—contrary to *Brintley, Whalen* and *Albernaz*—that multiple convictions for both a firearm felony offense, such as Missouri's armed criminal action statute, and the predicate felony, violate the Fifth Amendment of the United States Constitution.

In other words, as a result of this Court's dismissal of the defendant's appeal for want of a substantial federal question in *Brintley,* the Fifth Amendment is no bar to a defendant's multiple convictions, in the same proceeding, for both a felony firearms offense and the predicate felony in Michigan.

As a result of this Court's action in *Whack* v. *Maryland, supra,* and the Maryland Court's opinion in *Whack* v. *State,* 288 Md. 137, 416 A.2d 265 (Md. App., 1980), a defendant in Maryland also may be similarly convicted of both a felony firearms offense and the underlying felony.

As a result of this Court's decisions in *Delaware* v. *Hunter, supra,* and *Delaware* v. *Evans, supra,* and the Delaware Supreme Court's subsequent opinions in *Hunter* v. *State, supra,* and *Evans* v. *State, supra,* a defendant in Delaware may be convicted for both a felony firearms offense and the predicate felony.

However, as a result of the Missouri Supreme Court's intransigence and its inexplicable refusal to follow this Court's ruling in *Albernaz,* Missouri stands alone in holding that multiple convictions for both armed criminal ac-

tion and the underlying felony violates the Fifth Amendment.

But it is only the *state* courts in Missouri that take such a position. The federal courts already have begun to recognize that, in view of this Court's decision in *Albernaz,* multiple convictions for both armed criminal action and the underlying felony, imposed in a single proceeding, do not violate the Fifth Amendment. On July 29, 1981, the Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri, issued an order accepting the review and recommendation of the United States Magistrate in *Bullock* v. *Wyrick,* No. 80-400 C (2).[3]

The review and recommendation of the federal magistrate illustrates the conflicting views which currently exist between the Missouri Supreme Court and federal courts in Missouri regarding the issue involved in this petition. The federal magistrate addressed the issue as follows:

> "*Bullock* contends his conviction for armed criminal action was a violation of the rights secured by the Double Jeopardy Clause. This Court notes that armed criminal action and any other underlying felony may be the 'same' offense under *Blockburger* v. *United States, supra.* The standards enunciated by *Blockburger* are inapplicable to the offense of armed criminal action because the Missouri State Legislature has evinced the clear intent that punishment under the armed criminal action statute be in addition to punishment for the underlying felony. See *Sours* v. *State, supra,* wherein the Missouri Supreme Court definitively interpreted the Missouri Legislature's intent. The United States Supreme Court has recently held the

[3]The order of the judge and the recommendation of the magistrate are reprinted in Appendix D.

> Federal Double Jeopardy Clause does not bar multiple conviction and punishment where the legislature intends multiple and separate punishment. *Albernaz* v. *United States,* 101 S.Ct. 1137 (1981); *Whalen* v. *United States,* 445 U.S. 684 (1980); *Missouri* v. *Counselman,* 101 S.Ct. 1690 (1981); *Missouri* v. *Brown,* 101 S.Ct. 1735 (1981). This line of cases indicates if the Legislature intends crimes to be punished multiply and separately, then no Double Jeopardy violation exists. Only if the legislative intent is uncertain is the *Blockburger* test applied. Since the Missouri Legislature intended punishment for armed criminal action to be in addition to punishment for the underlying felony, no double jeopardy problem exists.

Magistrate's Review and Recommendation in *Bullock* v. *Wyrick, supra* (reprinted in Appendix D).

Further indication of the divergence of views between the Missouri Supreme Court and the federal district court is illustrated by an order issued by another United States District Judge for the Eastern District of Missouri. In *Woods* v. *Wyrick,* No. 79-498 C (1) (reprinted in petitioner's Appendix D), a state inmate alleged that his armed criminal action conviction violated the Double Jeopardy Clause. However, the federal district judge denied federal habeas corpus relief on the grounds that *Albernaz* permits such multiple punishments where the legislative intent to so punish is manifest. However, in a supplemental order issued subsequent to the Missouri Supreme Court's decision in *Haggard, supra,* and presumably to retain a harmonious relationship with the Missouri Supreme Court, the judge in *Woods* stayed the inmate's motion for reconsideration:

> "Because the United States Supreme Court is the final arbiter of United States Constitutional guaran-

tees, and after notification by affidavit of the Missouri Attorney General's intention to seek a writ of certiorari from the United States Supreme Court,

IT IS HEREBY ORDERED that petitioner's motion for reconsideration be and is STAYED until final disposition of *State of Missouri* v. *Robert Lee Haggard.*"

Order of H. Kenneth Wangelin, United States District Judge for the Eastern District of Missouri, in *Woods* v. *Wyrick, supra,* (reprinted in petitioner's Appendix D).

In summary, then, the petitioner believes that this Court's writ of certiorari should be granted in this case because both the Missouri Supreme Court and the Missouri Court of Appeals continue to reverse armed criminal action convictions, and return into society, dangerous felons who have been properly and constitutionally convicted. The Missouri Supreme Court has steadfastly refused to adhere to this Court's holdings in *Brintley* v. *Michigan, supra, Whalen* v. *United States, supra,* and *Albernaz* v. *United States, supra.* Since, as previously emphasized, the Missouri Supreme Court has expressly recognized that the Missouri legislature intended that multiple punishment be imposed on a defendant convicted of both armed criminal action and the underlying or predicate felony, *Albernaz* clearly holds that such punishment is constitutionally permitted, regardless of whether it is presumed that there are one or two offenses under the *Blockburger* test.

In *Albernaz,* this Court unequivocally held that, in considering whether or not multiple punishments may be imposed upon a defendant, the "'dispositive' question [i]s whether Congress intended to authorize separate punishments for the two crimes"; that this is so because "the

'power to define criminal offenses and to prescribe punishments to be imposed upon those found guilty of them, resides wholly with the Congress' "; that " 'where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee [against multiple punishments for the same offense] is limited to assuring that the court does not exceed its legislative authorization by imposing a multiple punishment for the same offense' ", and that consequently, " 'the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed.' *Albernaz* v. *United States, supra* 101 S.Ct. at 1145 (emphasis added.)

In view of this decision, it is clear that the Missouri Supreme Court's opinion in *State* v. *Haggard, supra,* and the decision of the Missouri Court of Appeals, Western District, in the instant case, which relied on *Haggard,* are directly and irreconcilably in conflict with this Court's decision in *Albernaz,* and must be vacated.

Accordingly, the petitioner would respectfully ask this Court to sustain the State of Missouri's request for a petition for writ of certiorari in this case, as well as the similar petitions previously filed by the State with this Court in *Missouri* v. *Haggard,* No. 81-625 (petition for certiorari filed Sept. 24, 1981), and *Wyrick* v. *Williams,* No. 80-2200 (petition for certiorari filed June 29, 1981.)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

APPENDIX A-1

MISSOURI COURT OF APPEALS

WESTERN DISTRICT

STATE OF MISSOURI,
Respondent,

vs.

DANNY HUNTER,
Appellant.

No. WD 31547
OPINION FILED:
August 18, 1981

APPEAL FROM THE CIRCUIT COURT OF
JACKSON COUNTY
Honorable Julian M. Levitt, Judge

Before Manford, P.J., Dixon and Nugent, JJ.

This direct appeal follows a jury conviction for robbery first degree, armed criminal action and assault with malice. The judgment is affirmed in part and reversed in part.

Appellant alleges that the trial court erred (a) in sentencing him for both robbery first degree and armed criminal action because he was placed in double jeopardy; (b) in imposing a greater sentence than that imposed by the jury for the robbery conviction; and (c) in admitting impermissible hearsay, violating his constitutional right of confrontation and cross-examination.

The sufficiency of the evidence is not challenged. Appellant, with two accomplices, entered the A & P Store at 75th and Wornall in Kansas City at approximately 5:30 p.m. on November 24, 1978. Appellant gained entrance to the store manager's booth and ordered the manager, at

gun point, to open the two safes in the booth area. While the manager was complying with appellant's demands, appellant struck the manager twice with the butt of the revolver. Although appellant was wearing a light silk stocking mask, he was as close as 12 inches from the manager's face and the manager was later able to make an unequivocal identification of appellant at a police line-up and at trial.

While the robbery was in progress, an employee reporting for work drove in front of the store. This employee soon realized that the robbery was in progress, drove to a nearby bank and advised an off-duty police officer. The officer proceeded to the front of the grocery store, and moments later, the robbery trio departed the store. The police officer observed appellant remove his mask and ordered the trio to halt. At this instant, appellant fired a shot at the officer, and the officer returned the fire. The trio escaped. At the police line-up and at trial, the officer made an unequivocal identification of appellant.

As the investigation of the robbery progressed, employees of the store identified from police photos one Eric Lawton as one of the robbers. Lawton was arrested and gave police a written confession. Appellant's arrest followed. In addition to being positively identified in the police line-up, appellant gave police two confessions. The first confession was oral, and appellant admitted to planning the robbery with his accomplices. The second confession was in writing and was made to correct what appellant contended were errors in Lawton's confession. In his written confession, appellant stated that he had been paid $300 to provide the getaway vehicle at a location other than the crime scene. Initially, appellant denied any involvement in the robbery and gave police three different

accounts of his whereabouts, but when confronted with Lawton's confession (which appellant spent 10-15 minutes reading), appellant made his oral and written confessions.

Appellant offered no direct evidence. The jury returned its verdict and assessed punishment. This appeal followed the denial of appellant's motion for new trial or in the alternative, for a reduction of sentence.

Appellant's point (a) is sustained. This court is bound by the ruling of our state Supreme Court in State v. Haggard, ____ S.W.2d ____ (Mo. 1981) (No. 62227, decided by the Missouri Supreme Court July 14, 1981) which reaffirmed Sours I (Sours v. State, 593 S.W.2d 208 [Mo.banc 1980]) and Sours II (Sours v. State, 603 S.W.2d 592 [Mo. banc 1980]). Under those decisions, appellant's conviction for armed criminal action is vacated and the sentence for that conviction is set aside.

Under point (b), appellant contends that the trial court imposed a sentence for the robbery conviction in excess of the sentence assessed by the jury. Appellant is correct that such action is prohibited. State v. Hardy, 98 S.W.2d 593 (Mo. 1936); § 557.036.3, RSMo 1978. However in the instant case, appellant's argument fails because it is premised upon an erroneous entry in the *legal file*. When the record of sentencing was transcribed from the *actual record* to the *legal file*, the sentence of ten years for robbery *assessed by the jury and imposed by the trial court* was entered as 15 years. The sentence reflected in the *legal file* was the result of a clerical error. The *true judgment* is represented by "the judicial act of the court" in the rendition of its judgment and is not represented by the act of the court clerk in transcribing the judgment. Massey v. State, 608 S.W.2d 152 (Mo.App. 1980); Allen v. Gibbons, 425 S.W.2d 423 (Mo.App. 1968); and Rehm v. Fishman, 395 S.W.2d 251 (Mo.App. 1965).

The record shows that the trial court entered the sentence of ten years upon the conviction for robbery first degree in full accord with the assessment by the jury. Appellant's point (b) is without merit and is ruled against him.

In his final point (c), appellant argues that the trial court erred in permitting a witness to testify that appellant was arrested the day after a confession was secured from one of appellant's accomplices. Appellant contends that this testimony was hearsay and that its admission violated his constitutional rights to confrontation and cross-examination.

The last witness called by respondent was a detective assigned to investigate the robbery. Eric Lawton, who had been arrested and identified as one of the robbers and who was in custody, gave police a written confession. Appellant was arrested the next day. In the initial interview with police, appellant gave two or three different accounts of his whereabouts the night of the crime. Appellant was then shown Lawton's confession and read and studied the confession for 10-15 minutes. Appellant then made an oral confession in which he admitted to planning the robbery with his accomplices, and followed this with a written confession which admitted his involvement in providing, upon receipt of $300, the getaway vehicle at a location other than the scene of the crime.

The officer witness testified to procedures and events occurring during his investigation. Appellant's complaint centers around the following portion of the officer's testimony:

"Q. (By Ms. Petren, assistant prosecuting attorney) Eric Lawton was arrested on February 26th, 1978, is that correct?

A. Yes.

Q. Did you have occasion to take a statement from Eric Lawton?

A. Yes, I did.

Q. After you took that statement did you have occasion to arrest Danny Hunter?

MR. PREMAN (attorney for appellant): Approach the bench, please. (The following proceedings were had at the bench.)

MR. PREMAN: Judge, I think this is exactly what we were talking about.

THE COURT: No, it isn't. You talked about statements made by Eric Lawton and he's not testified to any statements made by Eric Lawton. He only said what he did after he took the statement.

MR. PREMAN: Well, Judge, I think for the record, I think that does violate the protective order that you ordered and I would object to it and ask for a mistrial.

THE COURT: No, it doesn't violate the protective order. The motion for mistrial is overruled.

(The proceedings returned to open court.)

Q. (By Ms. Petren) Let me rephrase my question or ask the same question. You stated you had an occasion to take a statement from Eric Lawton; after that statement was taken you had occasion to arrest Danny Hunter?

MR. PREMAN: I object, Your Honor, it is repetitive. It was just asked and answered.

MS. PETREN: I don't believe he answered the question.

THE COURT: There was an objection before he answered. You are merely restating the question so he can answer it the second time. The objection is overruled.

Q. (By Ms. Petren) What date did you have occasion to arrest Danny Hunter?

A. I issued a pickup for him the evening that I got the statement from Eric Lawton on the 27th of February, 1979 and he was brought into the robbery unit under arrest on the morning of the 28th of February, 1979 by district officers."

Appellant presents a two-fold argument. He first claims a violation of his Sixth Amendment right to confrontation. He also argues a violation of the hearsay rule. In appellant's contention, he equates the two. This is not correct. The United States Supreme Court, while recognizing the right to confrontation guaranteed by the Sixth Amendment to the United States Constitution as a fundamental right "made obligatory upon the States by the Fourteenth Amendment," Pointer v. Texas, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed2d 923, 926 (1968), has nevertheless ruled: "[M]erely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied." California v. Green, 399 U.S. 149, 156, 90 S.Ct. 1930, 1934, 26 L.Ed.2d 489, 495-496 (1970). In further consideration of this point, the United States Supreme Court has set forth factors additional to the hearsay violation which are determinative of the constitutional violation question. In a case involving a Georgia statute which allowed into evidence a co-conspirator's out-of-court statement made during the concealment phase of the conspiracy *and which included the admission of the extra-judicial statement*, the court stated: "It seems apparent that the Sixth

Amendment Confrontation Clause and the evidentiary hearsay rule stem from the same roots. But this court has never equated the two and we decline to do so now." Dutton v. Evans, 400 U.S. 74, 86, 91 S.Ct. 210, 218, 27 L.Ed.2d 213, 225 (1970). In addition to the foregoing, the *Dutton* court outlined four points which it considered applicable in resolving the constitutional issue. The court stated that (a) the extra judicial statement contained no express assertion about a past fact; (b) the identity of the participants in the commission of the crime was known to the declarant and this was made clear from other evidence; (c) the possibility that the statement was founded on faulty recollection is remote in the extreme; and (d) the circumstances under which the declarant made the statement were such as to give reason to suppose the declarant did not misrepresent the accused's involvement in the crime. The foregoing were applied in *Dutton* as indicia of reliability. The court went on to say at 400 U.S. 89, 91 S.Ct. 220, 27 L.Ed.2d 227: "The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.' "

In *Dutton*, the actual extra-judicial statement was admitted. In the instant case that is lacking. It appears, nonethe less, that the above indicia would still be applicable in resolving the alleged constitutional violation. Appellant contends the officer's testimony that he arrested appellant was an assertion of the past fact that appellant had committed the robbery. In *Dutton*, at 400 U.S. 77, 91 S.Ct. 214, 27 L.Ed.2d 220, the court concluded that the extra judicial statement "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now," was insufficiently assertive concerning a past fact and re-

quired instead the operation of jury inference. In the instant case, no extra-judicial statement was offered or admitted, and it cannot be concluded, although insisted upon by appellant, that inferences which flow from the officer's testimony are sufficiently assertive of a past fact. Thus, under (a) above, appellant's confrontation allegation must fail.

Proceeding further (point [b]), this court finds there is ample evidence herein that the declarant (Lawton) knew the participants in the crime. This was established by appellant's oral and written confessions. Appellant's argument under (b) fails.

The evidence that Lawton, appellant and others planned the robbery, adduced by appellant's confession, shows a continued relationship between appellant and Lawton and negates the possibility that the declarant may have been mistaken when he placed appellant at the crime scene by inference. Thus, appellant's argument on confrontation under (c) fails. Finally, in (d) the circumstances surrounding the confession of Lawton in order to determine whether such statement was given to misrepresent the appellant's participation must be considered. In *Dutton*, the extra-judicial statement was uttered by declarant to a fellow inmate who was the testifying witness. In those circumstances, it might be said that the situation in which there was an absence of a motive to falsify would be greater than the instant case. However, remembering once again that there was no extra-judicial statement offered or introduced herein, the implication which appellant argues arose in this case occurred, if at all, during the early stages of Lawton's custody. At this stage of the proceedings, it might be said that a strong motive would have arisen on the part of the declarant. It could be reasonably concluded that there existed an incentive at this stage for

the declarant to falsify by implicating appellant and excluding himself for the purpose of escaping criminal responsibility. There is nothing in the evidence which suggests that Lawton disclaimed participation in the crime and in addition, blamed appellant. The extra-judicial statement in *Dutton* is likened to the confession of Lawton in that both were obviously against the penal interest discussed and noted in *Dutton*, In the instant case we have an inference tested against (d) for purposes of determining misrepresentation. There is no evidence to support any conclusion of misrepresentation. Under (d), appellant's confrontation allegations must fail.

Concerning the remaining portion of appellant's argument, it must be agreed that the previous testimony of the police officer was inferential hearsay and was erroneously admitted. This has been ruled in State v. Valentine, 587 S.W.2d 859 (Mo.banc 1979) which followed State v. Chernick, 280 S.W.2d 56 (Mo. 1955); State v. Johnson, 538 S.W.2d 73 (Mo.App. 1976), and State v. Edwards, 435 S.W.2d 1 (Mo. 1968). Our state Supreme Court in *Valentine* ruled at 861:

> "It is hornbook law that a witness may not testify to facts if those facts are based on hearsay. It is no less a violation of the hearsay rule to set up a set of circumstances by the testimony of a witness which invites the inference of hearsay."

Recognizing the full measure of the court's ruling in *Valentine*, this court nevertheless finds the instant case to be distinguishable from *Valentine*. In *Valentine*, the prosecution presented only one witness who identified appellant, but, as the court noted, "there were an estimated ten customers who could have witnessed what occurred." *Valentine* at 861. The court further pointed out that the officer at the scene apprehended one participant while the

other escaped. However, this officer "did not identify appellant at the trial as having been the fleeing accomplice." *Valentine* at 862.

In addition, the *Valentine* court noted that appellant offered an alibi defense from two witnesses who placed him elsewhere before, during, and for at least one hour after the crime. In *Valentine,* it was apparent that the one person who could be expected to know whether the defendant was the other participant refused to testify by invoking the privilege against self-incrimination pursuant to the 5th Amendment. Following that refusal, the prosecution called the officer who had been at the scene and apprehended one of the participants. This officer testified that after apprehending one of the participants, and without identifying the defendant, he was joined by other officers; and after their investigation, they put out an order for the arrest of the defendant. The prosecution then stressed that within as little as two hours, all the officers completed an investigation at the scene, issued the arrest order, found the defendant and transported the defendant to the police station. The court in *Valentine* concluded from the foregoing:

> "It is clear that the state has set up a set of circumstances that invites the inference of hearsay evidence, namely that Bateman told police appellant's name and described appellant's automobile."

Unlike in *Valentine,* the two witnesses in the instant case identified appellant as a participant and placed him at the scene of the crime. The store manager made a positive identification of appellant as the person who entered the store, confronted the manager with a gun, struck the manager twice with the gun, and fled the store with the proceeds of the robbery. An off-duty police officer immediately outside the store testified that he confronted

appellant as appellant was fleeing and positively identified appellant as the one who fired a shot at him while fleeing. Further, appellant made two confessions, one oral and one written, in which he admitted his involvement in the crime. Also, unlike in *Valentine*, appellant offered no defense alibi or otherwise.

While there is no doubt that the police testimony was inferential hearsay under *Chernick*, *Johnson*, *Edwards*, and *Valentine*, this court concludes that the disposition of this cause, because of the facts and circumstances herein, is not controlled by those authorities, but falls instead, under the rule in State v. Degraffenreid, 477 S.W.2d 57 (Mo. banc 1972), which declared:

> "Harmless error is not grounds for reversal. * * * We are also mindful that error which in a close case might call for a reversal may be disregarded as harmless when the evidence of guilt is strong."

The uncontroverted testimony of two witnesses who positively identified appellant as a participant in the robbery at the scene, in addition to the two confessions by appellant, is strong independent evidence of guilt. The admission of the inferential hearsay by way of the officer's testimony was error, but this court finds that under the instant facts and circumstances, the error was harmless. This court concludes from the record that the admission of such evidence did not tip the scales against the defendant and that such error was clearly harmless. *Degraffenreid*, *supra*. Point (c) is found to be without merit and is ruled against appellant.

The portion of the judgment relating to appellant's conviction for armed criminal action is vacated and the sentence set aside. That portion of the judgment relating

to appellant's conviction for robbery first degree and assault with malice is in all respects affirmed.

Donald L. Manford, P.J.

All concur.

APPENDIX A-2

No. 63396

IN THE

SUPREME COURT OF MISSOURI

WD # 31547

September Session 1981

State of Missouri, *Respondent,*

vs. TRANSFER

Danny Hunter, *Appellant.*

Now at this day, on consideration of Appellant's Application to transfer the above entitled cause from the Western District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

Now also at this day, on consideration of Respondent's Application to transfer the above entitled cause from the Western District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1981, and on the 10th day of November 1981, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 10th day of November 1981.

Thomas Simon, Clerk.

By: Norma Jean Creach, D.C.

APPENDIX B

Section 560.120, RSMo 1969, reads as follows:

"**560.120. Robbery in first degree.**—Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person; or who shall be convicted of feloniously taking the property of another from the person of his wife, servant, clerk or agent, in charge thereof, and against the will of such wife, servant, clerk or agent by violence to the person of such wife, servant, clerk or agent, or by putting him or her in fear of some immediate injury to his or her person, shall be adjudged guilty of robbery in the first degree."

Section 560.135, RSMo 1975 Supp., reads as follows:

"**560.135. Armed robbery, punishment for.**—Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon and every person convicted of robbery in the first degree by any other means shall be punished by imprisonment by the division of corrections for not less than five years; every person convicted of robbery in the second degree shall be punished by imprisonment by the division of corrections not exceeding five nor less than three years; every person convicted of robbery in the third degree shall be punished by imprisonment by the division of corrections not exceeding five years."

Section 559.225, RSMo 1976 Supp., reads as follows:

"**559.225. Armed criminal action—penalty—exceptions.**—1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of

armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than five years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committee [sic] by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of five calendar years.

3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than ten years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of ten calendar years.

4. The provisions of this section shall not apply to the felonies defined in sections 559.005, 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo."

APPENDIX C

Section 750.529, M.C.L.A., reads as follows:

"750.529. Armed robbery; aggravated assault—Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while committing an armed robbery as defined in this section, the sentence shall be not less than 2 years' imprisonment in the state prison. As amended P.A. 1959, No. 71, § 1, Eff. March 19, 1960."

Michigan Compiled Laws Annotated, 750.227b, reads as follows:

"Michigan Compiled Laws Annotated, 750.227b. *Possession at time of commission or attempted commission of felony; additional sentence, punishment—*

"Sec. 227b (1) A person who carries or has in his possession a firearm at the time he commits or attempts to commit a felony except the violation of section 227 or section 227a, is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this section, the person shall be imprisoned for 10 years.

"(2) The term of imprisonment prescribed by this section shall be in addition to the sentence imposed for the conviction of the felony or the attempt to commit the

felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

"(3) The term of imprisonment imposed under this section shall not be suspended. The person subject to the sentence mandated by this section shall not be eligible for parole or probation during the mandatory term, imposed pursuant to subsection (1). P.A. 1931, No. 328, § 227b, added to P.A. 1976, No. 6, § 1, Eff. Jan. 1, 1977." [footnote omitted.]

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

REGINALD BULLOCK, *Petitioner,* vs. DONALD WYRICK, Warden, *Respondent.*	No. 81-400C(2)

ORDER

Upon consideration of the record and the Magistrate's Review and Recommendation,

IT IS HEREBY ORDERED that the Review and Recommendation of the Honorable William S. Bahn, United States Magistrate, be and is accepted.

IT IS FURTHER ORDERED that petitioner's petition for a writ of habeas corpus be and is denied and that this case be and is dismissed.

JOHN P. NANGLE
UNITED STATES DISTRICT JUDGE

Dated: July 29, 1981.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

REGINALD BULLOCK,
Petitioner,

v.

DONALD WYRICK, etc.,
Respondent.

No. 81-400C(2)

MAGISTRATE'S REVIEW AND RECOMMENDATION

Reginald Bullock has filed this petition seeking federal habeas, pursuant to 28 U.S.C. § 2254. The matter has been referred to the undersigned United States Magistrate, pursuant to 28 U.S.C. § 636(b).

Bullock went to trial on January 17, 1978. Shortly after the jury was impaneled, Bullock pleaded guilty to all counts of a three count indictment charging first degree robbery, armed criminal action and burglary and stealing. Immediately thereafter, the St. Louis County Circuit Court Judge sentenced Bullock to fifteen years on the robbery, ten years on the armed criminal action, ten years on the burglary and five years on the stealing. All terms of imprisonment were to run concurrently. Bullock then filed a Rule 27.26 motion to vacate sentence. The circuit court denied relief. The Missouri Court of Appeals affirmed in part, but also vacated his conviction and sentence for armed criminal action on the basis of *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc 1980), *cert. denied sub. nom., Missouri* v. *Sours*, 101 S.Ct. 953 (1981). Bullock's motions for rehearing and trans-

fer were denied. *Bullock* v. *State*, 608 S.W.2d 480 (Mo.App. E.D. 1980). Bullock appears to raise here the same issues presented to the Missouri Court of Appeals. Therefore, petitioner has exhausted his available state remedies. Respondent does not dispute exhaustion.

The facts relating to the offense appear in the plea transcript and the indictment. On July 17, 1977, one Charles Dietrich found Bullock in his house. Bullock had several of Dietrich's firearms in his possession. Bullock then, using a knife, forced Dietrich into a bedroom. He bound Dietrich with a rope and removed a gold watch and currency from Dietrich's pocket.

As respondent correctly notes, Bullock's claims all revolve around his claim of double jeopardy. Therefore, the appropriate first step is to determine whether Bullock's conviction on this three count indictment violated rights secured by the Federal Double Jeopardy Clause. The proper first step is to examine the elements of said offenses.

The elements of first degree robbery as charged in the indictment and under § 569.020, RSMo (1969), requires the forcible stealing with intent to deprive, of the property of another, by threatened immediate use of a dangerous instrument. Stealing, as Bullock was charged, requires the taking and carrying away the property of another with the intent to deprive the owner of its use. Armed criminal action involves the commission of a felony by use of a dangerous instrument or deadly weapon. § 571.015, RSMo.

We note arguably, stealing and first degree robbery may involve the same elements except that first degree robbery has the additional element of threatened use of a dangerous weapon. Under the analysis of *Blockburger* v. *United States*, 284 U.S. 299 (1932), these two offenses could be the "same" offense for purpos. of the Double Jeopardy Clause. The Missouri Court of Appeals, however,

found the offense of stealing was completed prior to the time the robbery occurred. We agree. The facts elicited during the guilty plea proceedings demonstrate Bullock had burglarized the victim's house and was in possession of the victim's firearms when he was discovered by Dietrich. Only then did he commit the robbery, taking currency and a gold watch from the victim, and threatening him with a knife. Under these circumstances, convicting Bullock of stealing and robbery did not violate his double jeopardy rights. *United States* v. *Eisenberg*, 469 F.2d 156 (8th Cir. 1972), cited by petitioner, supports this principle. There, the Eighth Circuit held the bombing of two buildings constituted two separate offenses.

Bullock contends his conviction for armed criminal action was a violation of the rights secured by the Double Jeopardy Clause. This Court notes that armed criminal action and any other underlying felony may be the "same" offense under *Blockburger* v. *United States, supra*. The standards enunciated by *Blockburger* are inapplicable to the offense of armed criminal action because the Missouri State Legislature has evinced the clear intent that punishment under the armed criminal action statute be in addition to punishment for the underlying felony. *See, Sours* v. *State, supra*, wherein the Missouri Supreme Court definitively interpreted the Missouri legislature's intent. The United States Supreme Court has recently held the Federal Double Jeopardy Clause does not bar multiple conviction and punishment where the legislature intends multiple and separate punishment. *Albernaz* v. *United States*, 101 S.Ct. 1137 (1981); *Whalen* v. *United States*, 445 U.S. 684 (1980); *Missouri* v. *Counselman*, 101 S.Ct. 1690 (1981); *Missouri* v. *Brown*, 101 S.Ct. 1735 (1981). This line of cases indicates if the legislature intended crimes to be punished multiply and separately, then no double jeopardy violation exists. Only if the legislative intent is uncertain is the *Block-*

burger test applied. Since the Missouri legislature intended punishment for armed criminal action to be in addition to punishment for the underlying felony, no double jeopardy violation exists.

We note in passing, petitioner asserts his conviction for burglary violates his double jeopardy rights, apparently because the burglary was part of the "same transaction". Respondent properly notes the "same transaction" test is not the standard for double jeopardy. *See, Asle* v. *Swenson,* 397 U.S. 436 (1970). The controlling principles are announced in *Albernaz* and *Blockburger.*

Bullock contends his plea was not voluntary, knowing and intelligent because the offense he was charged with constituted double jeopardy. Since we find no double jeopardy violation, this claim is without merit. Furthermore, the Court made an extensive record during the plea proceedings in accordance with *Boykin* v. *Alabama,* 395 U.S. 238 (1969). The factual basis for the plea was developed. Bullock was informed of his rights. The record as a whole shows the guilty plea was voluntarily and intelligently entered.

Petitioner contends counsel was ineffective for not informing him the indictment violated his double jeopardy rights. This is not so for the reasons stated above. Furthermore, we note this case was tried before *Sours* v. *State, supra.* Counsel cannot be deemed incompetent for relying on *State* v. *Treadway,* 558 S.W.2d 646 (Mo. banc 1977), which prevailed at that time.

Bullock's final two claims are that the court lacked jurisdiction and considered invalid convictions during sentencing because it considered charges and convictions obtained in violation of his double jeopardy rights. Again, we find no such violation.

We note the Missouri Court of Appeals vacated Bullock's armed criminal action conviction under the authority of *Sours I* and *Sours II*. That was an appropriate step under the then persuasive precedent. This Court, having the benefit of *Albernaz, Counselman,* and *Brown,* has the firm conviction no double jeopardy violation ever existed.

As a final point, Bullock asserts infirmities existed in his state Rule 27.26 proceedings. Respondent properly points out such infirmities, even if proven, are not the basis for federal habeas. *Noble* v. *Sigler,* 351 F.2d 673 (8th Cir. 1965).

Therefore, the undersigned United States Magistrate recommends this petition be dismissed without further proceedings.

The parties are hereby advised that they have ten days from the service of this recommendation with which to file objections to same, pursuant to 28 U.S.C. § 636(b).

WILLIAM S. BAHN
UNITED STATES MAGISTRATE

Dated: June 25, 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

VAN WOODS,
Petitioner,

vs.

DONALD WYRICK, Warden,
Respondent.

No. 79-498C(1)

ORDER

This matter is before the Court upon petitioner's motion for reconsideration. For the reasons stated below, petitioner's motion will be stayed.

On July 14, 1981, this Court denied petitioner's request for the issuance of a writ of habeas corpus. On July 14 1981 the Missouri Supreme Court, en banc, issued a ruling which held that convictions for both armed criminal action and robbery in the first degree with a dangerous and deadly weapon, arising out of the same transaction, is a violation of the double jeopardy clause of the Fifth Amendment. *State of Missouri* v. *Robert Lee Haggard,* #62227, ____ S.W.2d ____ (July 14, 1981) (Mo. banc). Respondent opposes petitioner's motion for a rehearing, stating that the Missouri Supreme Court's ruling is contrary to the United States Supreme Court interpretation of federal constitutional guarantees.

Because the United States Supreme Court is the final arbiter of United States Constitutional guarantees, and after notification by affidavit of the Missouri Attorney

General's intention to seek a writ of certiorari from the United States Supreme Court,

IT IS HEREBY ORDERED that petitioner's motion for reconsideration be and is STAYED until final disposition of *State of Missouri* v. *Robert Lee Haggard*.

Dated this 23rd day of July, 1981.

H. Kenneth Wangelin
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

VAN WOODS,
Petitioner,

v.

DONALD WYRICK, Warden,
Respondent.

No. 79-498C(1)

ORDER

After careful consideration of the pleadings, motions, memoranda, exhibits of record, the opinion of the Eighth Circuit Court of Appeals, the review and recommendation of the United States Magistrate, and petitioner's objections thereto, and particularly in light of the Supreme Court's decision in *Albernaz* v. *United States*, 49 U.S.L.W. 4237 (March 9, 1981),

IT IS HEREBY ORDERED that Van Woods' petition for federal habeas relief pursuant to 28 U.S.C. § 2254 be denied.

H. Kenneth Wangelin
UNITED STATES DISTRICT JUDGE

Dated: July 14, 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

VAN WOODS,
Petitioner,

v.

DONALD WYRICK, Warden,
Respondent.

No. 79-498C(1)

ORDER

MAGISTRATE'S REVIEW AND RECOMMENDATION

Van Woods is back before this Court on remand from the United States Court of Appeals for the Eighth Circuit. We had previously denied Van Woods' federal habeas from concurrent sentences out of the State of Missouri for holdup and armed criminal action. The file is replete with the facts leading up to the federal habeas and we will not labor their repetition. At any rate, the District Court rejected Woods' claims of double jeopardy, relying on *State* v. *Treadway,* 558 S.W.2d 646 (Mo.St.Ct. 1977), *cert. denied,* 439 U.S. 838 (1978).

While this matter was pending in the Court of Appeals, the Missouri Supreme Court overruled *Treadway* in *Sours* v. *State,* No. 61458, filed January 15, 1980. The Supreme Court granted certiorari to the State of Missouri and remanded same to the courts in Missouri in light of *Whalen* v. *United States,* 445 U.S. 684 (1980). Upon remand, the Missouri Supreme Court reaffirmed its position that conviction of both armed criminal action

and robbery violated the double jeopardy clause of the Federal Constitution. *Sours* v. *State*, 603 S.W.2d 592 (Mo. 1980). The state's application for certiorari was denied.

On the heels of all of this analysis, the Supreme Court ruled in *Albernaz* v. *United States*, 49 U.S.L.W. 4237 (U.S. March 9, 1981), that punishments on separate counts of conspiracy to distribute marijuana and conspiracy to import marijuana could stand, even though both convictions were based upon the same facts.

We note that the United States Supreme Court, on March 23, 1981, vacated several judgments of the Court of Appeals of Missouri, Eastern District, and remanded same for further consideration in light of *Albernaz* in *Missouri* v. *Counselman, Jr.*, No. 80-754. In these remands which include *Counselman* and four others, the United States Supreme Court has misgivings about Missouri's application of the double jeopardy contentions, arising from dual convictions for robbery and armed criminal action.

In *Sours, supra*, the Missouri Supreme Court conceded that the Missouri legislature did intend to impose multiple punishments for armed criminal action and the underlying felony. If you take these conclusions and distill them through *Albernaz, supra, Whalen, supra,* and *Kowaski* v. *Parratt*, 533 F.2d 1071 (8th Cir. 1976), all of which cases indicate that where Congress intended to impose multiple punishments for convictions of separate crimes, even though perpetrated in one proceeding, then no double jeopardy violation occurs. To be grossly simplistic, we conclude that since robbery can be accomplished without a weapon, and therein, become a crime in itself, then to accompanying the robbery with the use of a weapon, you have satisfied the requirements of both the robbery and armed criminal action. Resultant prosecution could bring

about two distinct convictions, because the second conviction contains an element of proof, not required by the first and thereby becomes a separate and distinct crime. This dichotomous theory has been debated in numerous state and federal courts. All seem to agree that the lawmakers' intention, should be controlling in the analysis of separate and distinct crimes. The only obstacle to these interpretations would be the double jeopardy provisions of the Constitution, which only protect against repeat prosecution of the same crime.

In the Van Woods case, we think the facts support the two convictions and resultant consecutive sentences imposed. Therefore, it is our recommendation that his application for federal habeas corpus be dismissed without further proceedings.

The parties are hereby advised that they have ten days from the service of this recommendation within which to file objections to same, pursuant to 28 U.S.C. § 636(b).

WILLIAM S. BAHN
UNITED STATES MAGISTRATE

Date: June 12, 1981

Joint Appendix

Office - Supreme Court, U.S.
FILED
JUN 23 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1214

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

STATE OF MISSOURI,
Petitioner,

v.

DANNY HUNTER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

JOINT APPENDIX

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COUNT I. ROBBERY, FIRST DEGREE

COUNT II. ARMED CRIMINAL ACTION

COUNT III. ASSAULT WITH INTENT TO DO GREAT BODILY HARM WITH MALICE AFORETHOUGHT

AMENDED INFORMATION

STATE OF MISSOURI

vs.

DANNY HUNTER
7/8/55

In the Circuit Court of Jackson County, Missouri, at Kansas City, September Term, 1979. In Division Number 17 thereof, designated by the rules of said Court as Criminal Division D.

Now comes Carol A. Petren Assistant Prosecuting Attorney for the State of Missouri, in and for the body of the County of Jackson, and upon his oath informs the Court, that DANNY HUNTER whose Christian name in full is unknown to said Assistant Prosecuting Attorney, late of the county aforesaid, on the 24th day of November, 1978, at the County of Jackson, State of Missouri, did then and there either acting alone or knowingly in concert with another, did then and there unlawfully and feloniously make an assault in and upon one Vince Ponchur, with a dangerous and deadly weapon, to-wit: an unknown type handgun, loaded with gunpowder and leaden balls, and did feloniously rob, steal, take and carry away certain property, to-wit: U.S. Currency and Coins, undetermined amount, in the aggregate value of undetermined amount, the money and personal property of A & P Food Store, a

Corp., in the care and custody of Vince Ponchur, from the person and against the will of the said Vince Ponchur, then and there, by force and violence to the person of the said Vince Ponchur, and by putting the said Vince Ponchur in fear of an immediate injury to his person;

SECTION 560.120, 560.135, RSMo 1969

COUNT II

Now comes Carol A. Petren, Assistant Prosecuting Attorney for the State of Missouri, in and for the body of the County of Jackson, and upon her oath, informs the Court, that DANNY HUNTER, whose Christian name in full is unknown to said Assistant Prosecuting Attorney, late of the county aforesaid, on the 24th day of November, 1978, at the county of Jackson, State of Missouri, did then and there either acting alone or knowingly in concert with another, unlawfully, wilfully and feloniously commit the felony offense of robbery, first degree upon one Vince Ponchur, by, with and through the use, aid and assistance of a dangerous and deadly weapon, to-wit: an unknown type handgun, loaded with gunpowder and leaden balls;

SECTION 559.225 RSMo 1969

COUNT III

Now comes Carol A. Petren, Assistant Prosecuting Attorney for the State of Missouri, in and for the body of the County of Jackson, and upon her oath, informs the Court, that DANNY HUNTER, whose Christian name in full is unknown to said Assistant Prosecuting Attorney, late of the County aforesaid, on the 24th day of November, 1978, at the County of Jackson, State of Missouri, did then and there either acting alone or knowingly in concert with another, unlawfully, wilfully and feloniously, on pur-

pose and of his malice aforethought, make an assault upon one Harry Gurin by then and there shooting at said Harry Gurin, likely to produce death or great bodily harm, with the felonious intent the said Harry Gurin to do great bodily harm; against the peace and dignity of the State.

SECTION 559.180, RSMo 1969

[Signature of Carol A. Petren]
Assistant Prosecuting Attorney.

[Jurat omitted]

INSTRUCTION NO. 7

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

First, that on the 24th day of November, 1978, in the County of Jackson, State of Missouri, Vince Ponchur was in charge of an undetermined amount of United States currency and coins, and

Second, that at that time and place the defendant took the property from Vince Ponchur against his will by causing him to fear immediate injury to his person, and

Third, that the defendant took the property with the intent to permanently deprive Vince Ponchur of the property and to convert it or any part of it to the use of the defendant and another, and

Fourth, that the defendant acted either alone or knowingly and with common purpose together with another in the conduct referred to in the above paragraphs,

then you will find the defendant guilty under Count I of robbery in the first degree.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of the foregoing, you must find the defendant not guilty of that offense.

If you do find the defendant guilty under Count I of robbery in the first degree, you will fix his punishment at imprisonment by the Department of Corrections for a term fixed by you, but not less than five years nor more than life imprisonment.

INSTRUCTION NO. 8

As to Count II, if you find and believe from the evidence beyond a reasonable doubt:

First, that the defendant is guilty under Count I of Robbery in the First Degree, and

Second, that the defendant committed that offense by, with or through the use, assistance or aid of a deadly weapon, and

Third, that the defendant acted either alone or knowingly and with common purpose together with another in the conduct referred to in the above paragraphs,

then you will find the defendant guilty under Count II of armed criminal action.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

If you do find the defendant guilty under Count II of armed criminal action, you will assess and declare his punishment at imprisonment by the division of corrections for a term fixed by you, but not less than three years or more than life imprisonment.

INSTRUCTION NO. 9

As to Count III, if you find and believe from the evidence beyond a reasonable doubt:

First, that on the 24th day of November, 1978 in the County of Jackson, State of Missouri, the defendant shot at Harry Gurin, and

Second, that he did so with malice aforethought—that is, intentionally and without just cause or excuse and after thinking about it beforehand for any length of time, and

Third, that he did so with intent to maim Harry Gurin, and

Fourth, that the defendant acted either alone or knowingly and with common purpose together with another in the conduct referred to in the above paragraphs,

then you will find the defendant guilty under Count III of assault with intent to maim with malice aforethought.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of the foregoing, you must find the defendant not guilty under Count III of that offense.

If you do find the defendant guilty under Count III of assault with intent to maim with malice aforethought you will fix his punishment at imprisonment by the Department of Corrections for a term fixed by you, but not less than two years nor more than life imprisonment.

VERDICT FORM

As to Count I, we, the jury, find the defendant, DANNY HUNTER, guilty of robbery in the first degree as submitted in Instruction No. 7.

We fix the punishment at 10 years.

Glenn W. Shults
FOREMAN

VERDICT FORM

As to Count II, we, the jury, find the defendant, DANNY HUNTER, guilty of armed criminal action as submitted in Instruction No. 8.

We fix the punishment at 15 years.

Glenn W. Shults
FOREMAN

VERDICT FORM

As to Count III, we, the jury, find the defendant, DANNY HUNTER, guilty of assault with intent to do great bodily harm with malice aforethought as submitted in Instruction No. 9.

We fix the punishment at 5 years.

Glenn W. Shults
FOREMAN

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

State of Missouri	Plaintiff	No. CR79-0408 Ct. 1—Robbery First Degree
vs		Ct. 2—Armed Criminal Action
Danny Hunter	Defendant	Ct. 3—Assault With Intent To Do Great Bodily Harm With Malice

JUDGMENT/SENTENCE

On January 2nd, 1980, comes the Assistant Prosecuting Attorney, Robert Shepherd, comes also the defendant, Danny Hunter, in person and by attorney, Vance Preman, and said defendant having been convicted by a jury of the charges of Ct. 1—Robbery First Degree, Ct. 2—Armed Criminal Action and Ct. 3—Assault With Intent To Do Great Bodily Harm With Malice; defendant's Motion For A New Trial Or In The Alternative Motion For Reduction Of Punishment heretofore filed herein on the 3rd day of October, 1979, is by the Court this day overruled.

Now said defendant being asked by the Court if he has any legal cause to show why sentence should not be pronounced against him in accordance with said verdict, and said defendant having nothing further to say and showing no legal cause why sentence should not be pronounced and judgment rendered against him according to the law upon the verdict of the jury heretofore had herein.

The Court now being fully advised in the premises fixes the punishment of said defendant at ten [10] years, to be confined at the direction of the Reception and Diagnostic Center, Division of Corrections, Jefferson City, Missouri for said offense of Ct. 1—Robbery First Degree, and in addition thereto at fifteen [15] years for said offense of Ct. 2—Armed Criminal Action, sentences imposed in Cts. 1 & 2 to run concurrently, and in addition thereto at five [5] years for said offense of Ct. 3—Assault With Intent To Do Great Bodily Harm With Malice, sentence imposed in Ct. 3 to run consecutively to the sentences imposed in Cts. 1 & 2, making a total of twenty [20] years in the Reception and Diagnostic Center, Division of Corrections, Jefferson City, Missouri, for said offenses of Ct. 1—Robbery First Degree, Ct. 2—Armed Criminal Action and Ct. 3—Assault With Intent To Do Great Bodily Harm With Malice.

Wherefore, it is ordered and adjudged by the Court that said defendant, Danny Hunter, do undergo confinement at the direction of the Reception and Diagnostic Center, Division of Corrections, Jefferson City, Missouri, to be confined in the appropriate penal institution for a period of ten [10] years, for said offense of Ct. 1—Robbery First Degree, and in addition thereto at fifteen [15] years, for said offense of Ct. 2—Armed Criminal Action, sentences imposed in Cts. 1 & 2 to run concurrently, and in addition thereto at five [5] years for said offense of Ct. 3—Assault With Intent To Do Great Bodily Harm With Malice, sentence imposed in Ct. 3 to run consecutively to the sentences imposed in Cts. 1 & 2—making a total of twenty [20] years in the Reception and Diagnostic Center, Division of Corrections, Jefferson City, Missouri for said offenses of Count 1—Robbery First Degree, Count 2—Armed Criminal Action and Count 3—Assault With Intent To Do Great Bodily Harm With Malice; and that the

State of Missouri do have and recover of and from said defendant all costs herein, and that execution issue therefor.

It is further ordered by the Court that said defendant be remanded to the custody of the Correctional Officer of the Jackson County Department of Corrections, there to be kept, confined and treated in the manner directed by law, and the Reception and Diagnostic Center, Division of Corrections at Jefferson City, Missouri is required to receive and safely keep him until the judgment and sentence of the Court herein be complied with or until the said defendant shall be otherwise discharged by due course of law.

It is further ordered by the Court that said defendant be given credit for time served in jail awaiting trial.

Appeal Bond set at $20,000.00.

[Signature of Julian M. Levitt]

JULIAN M. LEVITT, JUDGE, DIVISION 17

Opposition

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No. 81-1214

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

STATE OF MISSOURI,
Petitioner,

vs.

DANNY HUNTER,
Respondent,

On Petition for Writ of Certiorari to the Missouri Court of Appeals, Western District.

RESPONDENT'S BRIEF IN OPPOSITION

JAMES W. FLETCHER
Public Defender

GARY L. GARDNER
Assistant Public Defender

1305 Locust, Suite 202
Kansas City, Missouri 64106
816/474-5811

Attorneys for Respondent
DANNY HUNTER

QUESTION PRESENTED

If this Court grants a writ of certiorari in this case, despite respondent DANNY HUNTER'S opposition thereto, then it should be granted to resolve only the following question presented.

Whether the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution is violated by imposing multiple punishment, which the legislature intended, in a single prosecution for both armed criminal action, §559.225, RSMo Supp. 1976, and its underlying felony, when each offense does not require proof of an element which the other does not.

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No. 81-1214

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

STATE OF MISSOURI,
Petitioner,

v.

DANNY HUNTER,
Respondent,

On Petition for Writ of Certiorari to the Missouri Court of Appeals, Western District.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent DANNY HUNTER respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Missouri Court of Appeals, Western District, opinion in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent DANNY HUNTER adds to the constitutional and statutory provisions involved, cited by petitioner at pages 2 through 3 and A-15 through A-18 of its petition, the following statutes.

Section 556.041(1), RSMo 1978, reads as follows:

> Section 556.041. Limitations on conviction for multiple offenses. -- When the same conduct of a person may establish the commission of more than one offense he may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if
>
> (1) One offense is included in the other, as defined in section 556.046;

Section 556.046.1(1), RSMo 1978, reads as follows:

> 556.046. Conviction of included offenses. --
> 1. A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when

(1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged;

REASONS FOR DENYING THE WRIT

1. The decision below does not conflict with decisions of this Court, because there is no decision of this Court which is stare decisis for the decision below.

Petitioner asserts as a reason for granting the writ that the decision below, State v. Hunter, 622 S.W.2d 374 (Mo. App. W.D. 1981), in relying on State v. Haggard, 619 S.W.2d 44 (Mo. banc 1981), conflicts with decisions of this Court, particularly Albernaz v. United States, 450 U.S. ___, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981), Brintley v. Michigan, 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979), and Whack v. Maryland, ___U.S.___ 101 S.Ct. 1688, 68 L.Ed.2d 189 (1981).

Petitioner asserts that the ultimate and penultimate sentences in Albernaz should have controlled the decision in Haggard. There is no conflict between Albernaz and Haggard, because Albernaz is not stare decisis for Haggard and the ultimate and penultimate sentences in Albernaz are dicta, unnecessary for this Court's conclusion therein. In Albernaz, conspiracy to import marihuana and conspiracy to distribute marihuana each required proof of an element which the other did not. Albernaz, supra, 67 L.Ed.2d at 281. In Haggard, armed criminal action and first degree robbery each did not require proof of an element which the other did not. Haggard, supra, 619 S.W.2d at 50. In other words, the issues in Albernaz and Haggard were different. In Albernaz, the issue was does the Double Jeopardy Clause prohibit the imposition of multiple punishment, which the legislature intended, in a single prosecution for two offenses each of which required proof of an element which the other did not. In Haggard, the issue was the same, but for there being two offenses each of which did not require proof of an element which the other did not. Broad language, unnecessary to a decision of this Court, cannot be considered binding authority. Kastigar v. United States,

406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212, 222-223 (1972). Thus, the Supreme Court of Missouri has not refused to be bound by a controlling decision of this Court.

Petitioner asserts that the Supreme Court of Missouri failed to be bound by Albernaz, because it failed to recognize that the Blockburger test, Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306, 309 (1932), is solely "a rule of statutory construction" which "because it serves as a means of discerning congressional purpose should not be controlling where, for example, there is a clear indication of contrary legislative intent." Albernaz, supra, 67 L.Ed.2d at 284. The Blockburger test is also a rule of constitutional magnitude. Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187, 194 (1977); Albernaz, supra, 67 L.Ed.2d at 280 and 285, fn. 3. The clear indication of contrary legislative intent to which Albernaz refers is an "intent contrary to the presumption accorded these statutes after application of the Blockburger test." Albernaz, supra, 67 L.Ed.2d at 282. The presumption is that Congress, because it was silent upon the matter, intended to punish multiply the two offenses each of which required proof of an element which the other did not. Albernaz, supra, 67 L.Ed.2d at 282-283. Thus, had Congress expressed an intention to punish only singly the two offenses, the Blockburger test, as a rule of statutory construction, would not be controlling.

Petitioner asserts that this Court's dismissal for want of a substantial federal question of the appeal in Brintley v. Michigan, 444 U.S. 948, 100 S.Ct. 418, 62 L.ED.2d 317 (1979), which presented a constitutional issue "identical" to the one presented herein, was binding upon the Missouri Supreme Court in Haggard. There is no conflict between Brintley and Haggard, because Brintley is not stare decisis for Haggard. In Wayne County Prosecutor v. Recorder's Court Judge, 406 Mich. 374, 280 N.W.2d 793 (1979), the case below in Brintley, the Michigan Supreme Court held that felony-firearm and armed robbery (and felony-firearm and second degree murder) each required proof of an element which the other did not. Wayne County Prosecutor, supra, 280 N.W.2d at 799. This court is bound by the

construction of a state statute by the highest court of a state. Memorial Hospital v. Maricopa County, 415 U.S. 250, 84 S.Ct. 1076, 39 L.Ed.2d 306, 314 (1973). In Haggard, armed criminal action and first degree robbery each did not require proof of an element which the other did not. Haggard, supra, 619 S.W.2d at 50. In other words the issues in Brintley and Haggard, as in Albernaz and Haggard, were different.

Petitioner asserts that this Court's dismissal for want of jurisdiction or, in the alternative, denial of certiorari in Whack v. Maryland, ___U.S.___, 101 S.Ct. 1688, 68 L.Ed.2d 189 (1981), which presented a constitutional issue idential to the one presented here, was binding upon the Missouri Supreme Court in Haggard. There is no conflict between Whack and Haggard, because Whack is not stare decisis for Haggard. In Whack v. State, 288 Md. 137, 416 A.2d 265 (Md. App. 1980), the case below in Whack, the Maryland Court of Appeals ony assumed, rather than held, that robbery with a dangerous and deadly weapon and use of a handgun in the commission of a felony, each did not require proof of an element which the other did not. Whack v. State, supra, 416 A.2d at 271. This court ought not to pass on questions of constitutionality unless such adjudication is unavoidable. Harris v. McRae, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784, 798 (1980). Furthermore, the Maryland Court of Appeals noted that Couplin v. State, 37 Md. App. 567, 378 A.2d 197, 205 (Md. Sp. App. 1977), cert. denied, 281 Md. 735 (1978) held that those two offenses each required proof of an element which the other did not. Whack v. State, supra, 416 A.2d at 271, fn. 5. This Court is bound by the construction of a state statute by the highest court of a state. Memorial Hospital v. Maricopa County, supra, 39 L.Ed.2d at 314. In Haggard, armed criminal action and first degree robbery each did not require proof of an element which the other did not. Haggard, supra, 619 S.W.2d at 50. Thus, Whack is not stare decisis for Haggard, because either the court below in Whack did not decide a federal question, since it only assumed the two offenses were

the same, or the issues in Whack and Haggard, as in Albernaz and Haggard and Brintley and Haggard, were different.[1]

2. The question presented is not an important question of federal law which should be settled by this Court, because its resolution will affect only twenty-five persons.

The question presented, whether it be in the form proposed by petitioner or by respondent Hunter, is not an important question of federal law which should be settled by this Court, because its resolution will affect only twenty-five persons -- respondent Hunter, the twenty-three respondents in Missouri v. Haggard, No. 81-625, and the respondent in Wyrick v. Williams, No. 80-2200, both of which are petitions for certiorari pending in this Court. No person convicted of armed criminal action occurring on or subsequent to January 1, 1979 will be affected by this Court resolving the question presented.

Armed criminal action, §559.225, RSMo Supp. 1976, of which respondent Hunter was convicted, was enacted in C.C.S.H.B. 1231, 997, 1024, 1116, 1332 and 1346, 78th General Assembly, 2nd Session, Laws of Mo. 1975-76, pp. 780-781. It was effective August 13, 1976. C.C.S.H.B. 1231, 997, 1024, 1116, 1332, 78th General Assembly, 2nd Session, Laws of Mo. 1975-76, p. 842. The Criminal Code was enacted in S.B. 60, 79th General Assembly, 1st Session, Laws of Mo. 1977, pp. 658-718. It was effective January 1, 1979. S.B. No. 60, 79th General Assembly, 1st Session, Laws of Mo. 1977, p. 718. As a part of The Criminal Code, §559.225, RSMo Supp. 1976, was repealed and virtually identical §571.015, RSMo 1978, was enacted in lieu thereof. S.B. No. 60, 79th General Assembly, 1st Session, Laws of Mo. 1977, pp. 659, 663, 700. Also a part of The Criminal Code are

---

[1] Petitioner also asserts that Haggard conflicts with decisions of the United States District Court for the Eastern District of Missouri. Only conflicts with a federal court of appeals, not a federal district court, provide a basis for granting certiorari. Rule 17.1(b).

§§556.041(1) and 556.046.1(1), RSMo 1978. S.B. No. 60, 79th General Assembly, 1st Session, Laws of Mo. 1977, p. 665. Thus, §559.225, RSMo Supp. 1976, existed in Missouri only from August 13, 1976 through December 31,1978, and persons in Missouri convicted of armed criminal action occurring on or subsequent to January 1, 1979 are convicted under §571.015, RSMo 1978, as a part of The Criminal Code.

In State ex rel. Westfall v. Ruddy, 621 S.W.2d 42 (Mo. banc 1981), the Supreme Court of Missouri held that persons convicted of armed criminal action under §571.015, RSMo 1978, may not also be convicted of the underlying felony because of the operation of §§556.041(1) and 556.046.1(1), RSMo 1978.

> The offense which was the subject of Sours I and II was committed prior to January 1, 1979. The instant offense arose after January 1, 1979, and is therefore subject to the provisions of The Criminal Code. There is no doubt that the Missouri General Assembly intended and hoped that the substantially increased penalties imposed by the armed criminal action statute would deter or diminish the number of killings which, regrettably, have become commonplace when a weapon is used in the commission of a felony. This intention can be given effect by applying §§556.041 and 556.046 [,RSMo 1978,] to this case. In this way the armed criminal action statute remains a viable part of our criminal law and is available to punish more severely those who use weapons to commit felonies.
>
> Application of criminal code §§556.041(1) and 556.046.1(1) [,RSMo 1978,] permits the prosecutor to charge a defendant, in separate counts, with both the underlying felony ... and armed criminal action ... and, if the evidence supports both, to submit both felonies to the jury ....
>
> ....
>
> The prosecution is not prohibited from charging and trying the defendant for armed criminal action and [the underlying felony]. Assuming that the evidence in the case supports both crimes, the court may instruct on both armed criminal action and the underlying felony; however, the jury may convict of only one of them pursuant to §556.041(1) [,RSMo 1978]. This means that the jury must be instructed that, while they are not required to convict of any offense, that these two offenses are submitted in the alternative and the jury may not convict the defendant of more than one of them.

State ex rel. Westfall v. Ruddy, supra, 621 S.W.2d at 44-45, footnotes omitted.

As a matter of Missouri statutory and not federal constitutional law, persons convicted of armed criminal action occurring on or subsequent to January 1, 1979 may not also be convicted of the underlying felony. These persons will not be affected by this Court resolving the question presented, because the operation of Missouri statutes prevents them from being convicted of two offenses. Only twenty-five persons convicted of armed criminal action occurring from August 13, 1976 through December 31, 1978 and, in addition thereto, the underlying felony will be affected by this Court resolving the question presented. Since so few people are affected by the question presented, it is not an important question of federal law, meriting this Court's resolution.[2]

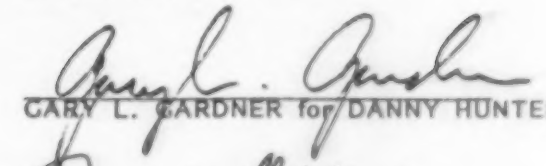
---

[2]Respondent Hunter has not been released back into society because of his armed criminal action conviction being reversed. That reversal in no way affected the validity of his conviction for the underlying felony which still stands.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted



GARY L. GARDNER for DANNY HUNTER

JAMES W. FLETCHER for DANNY HUNTER

JAMES W. FLETCHER
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1305 Locust, Suite 202
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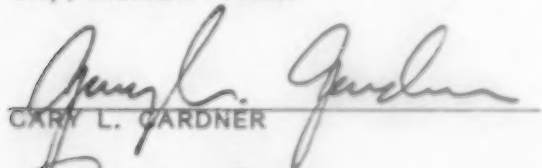
Attorneys for Respondent
Danny Hunter

I hereby certify that one copy of the foregoing has been deposited in a United States mailbox, first class postage prepaid, on this the 28th day of January, 1982 to Philip M. Koppe, Assistant Attorney General, 615 East 13th Street, Room G-20, Kansas City, Missouri 64106.



GARY L. GARDNER

JAMES W. FLETCHER

No. 81-1214

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

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SUPREME COURT, U.S.

STATE OF MISSOURI,
Petitioner,

v.

DANNY HUNTER,
Respondent,

On Petition for Writ of Certiorari to the Missouri Court of Appeals, Western District.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now DANNY HUNTER, respondent herein, by and through his court-appointed attorney, and move this Honorable Court for leave to file his Brief in Opposition without prepayment of costs, if any, and to proceed in forma pauperis herein pursuant to Rule 46. Respondent sought from the Circuit Court of Jackson County, Missouri, the trial court below, leave to perfect his appeal to the Missouri Court of Appeals, Western District, in forma pauperis, and such leave was granted.

Respectfully submitted

GARY L. GARDNER for DANNY HUNTER

JAMES W. FLETCHER for DANNY HUNTER

JAMES W. FLETCHER
Public Defender

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Attorneys for Respondent
DANNY HUNTER

I hereby certify that one copy of the foregoing has been deposited in a United States mailbox, first class postage prepaid, on this the 20th day of January, 1982 to Phillip M. Koppe, Assistant Attorney General, 615 East 13th Street, Room G-20, Kansas City, Missouri, 64106.

GARY L. GARDNER

JAMES W. FLETCHER

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SUPREME COURT, U.S.

No. 81-1214

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

STATE OF MISSOURI,
Petitioner,

v.

DANNY HUNTER,
Respondent.

On Petition for Writ of Certiorari to the Missouri Court of Appeals, Western District.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Danny Hunter, being first duly sworn, depose and say that I am the respondent in the above-entitled case; that in support of my motion for leave to proceed in forma pauperis I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe the State of Missouri is not entitled to redress; and that I desire to oppose the issues raised by the State in its petition for writ of certiorari.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to the petition are true.

1. Are you presently employed?

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

Answer:

I'm presently in the Missouri State Penitentiary My last job was in 1978 at $12.00 a month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   a. If the answer is yes, describe each source if income, and state the amount received from each during the past twelve months.

Answer:

I receive 7.50 a month from the penitentiary.

3. Do you own any cash or checking or savings account?

   a. If the answer is yes, state the total value of the items owned.

Answer:

NO

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   a. If the answer is yes, describe the property and state its approximate value.

Answer:

NO

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Answer:

Jeanille Lewis. Daughter.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Danny Hunter
DANNY HUNTER

SUBSCRIBED AND SWORN TO before me this ____ day of JAN 1 1 1982, 1981.

ROBERT A. FOREMAN
NOTARY PUBLIC STATE OF MISSOURI
MY COMMISSION EXPIRES AUGUST 8, 1984

Robert A. Foreman
Notary Public

I hereby certify that one copy of the foregoing has been deposited in a United States mailbox, first class postage prepaid, on this 20th day of January, 1982 to Philip M. Koppe, Assistant Attorney General, 615 East 13th Street, Room G-20, Kansas City, Missouri, 64106

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GARY L. GARDNER

James W. Fletcher
JAMES W. FLETCHER

Petitioner's Brief

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WESTERN DISTRICT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the imposition of multiple convictions and sentences at a single trial for both armed criminal action (defined by § 559.225, RSMo Supp. 1976, as the commision of a felony "by, with, or through the use, assistance, or aid of a dangerous or deadly weapon"), and the underlying or predicate felony, for conduct arising from the same transaction, violates the double jeopardy clause of the Fifth Amendment to the United States Constitution, insofar as it bars "multiple punishments for the same offense", where such multiple convictions and sentences are expressly authorized by statute.

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WESTERN DISTRICT

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Missouri Court of Appeals, Western District, in *State of Missouri* v. *Danny Hunter,* No. WD 31,547, the case involved in this petition, was filed on August 18, 1981, and is now published at *State* v. *Hunter,* 622 S.W.2d 374 (Mo.App., W.D. 1981). It also has been reprinted in its entirety at pp. A-1 through A-12 of Appendix A-1 of the State's petition for writ of certiorari.

JURISDICTIONAL STATEMENT

The opinion of the Missouri Court of Appeals, Western District, reversing the respondent's conviction and 15-year sentence for armed criminal action was filed on August 18, 1981, and became final on November 10, 1981, when the Missouri Supreme Court denied the petitioner's application to transfer. The petitioner's petition for writ of certiorari was timely filed and docketed with this Court on December 30, 1981, within 60 days of the date the judgment became final, as required by 28 U.S.C. § 2101(d) and Rule 20.1 of this Court. The petitioner's petition for a writ of certiorari was granted by this Court on April 5, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *

2. Section 560.120, RSMo 1969, provides:

> Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person; or who shall be convicted of feloniously taking the property of another from the person of his wife, servant, clerk or agent, in charge thereof, and against the will of such wife, servant, clerk or agent by violence to the person of such wife,

servant, clerk or agent, or by putting him or her in fear of some immediate injury to his or her person, shall be adjudged guilty of robbery in the first degree.

3. Section 560.135, RSMo Supp. 1975, provides in pertinent part:

> Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon and every person convicted of robbery in the first degree by any other means shall be punished by imprisonment by the division of corrections for not less than five years; * * *

4. Section 559.225, RSMo Supp. 1976, provides in pertinent part:

> * * *[A]ny person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed, by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years. * * *

STATEMENT OF CASE

Following a jury trial in the Circuit Court of Jackson County, Missouri, 16th Judicial Circuit, the respondent, Danny Hunter, was convicted on September 26, 1979, of robbery in the first degree [§ 560.120, RSMo 1969; § 560.135,

RSMo Supp. 1975], under Count I, armed criminal action [§ 559.225, RSMo Supp. 1976] under Count II, and assault with intent to do great bodily harm with malice aforethought [§ 559.180, RSMo 1969], under Count III (Tr. 298-299). The jury assessed a punishment of ten years for robbery, 15 years for armed criminal action and five years for assault (Tr. 299). On January 2, 1980, the respondent was sentenced by the Honorable Julian M. Levitt, Judge of Division No. 17 of the Circuit Court, to the terms imposed by the jury (Supp.Tr. 4-6). The court ordered the sentences for robbery and armed criminal action to be served concurrently but consecutively with the respondent's five-year sentence for assault, making a total of 20 years (Tr. 5-6).

On August 18, 1981, the Missouri Court of Appeals, Western District, affirmed the respondent's convictions and sentences for robbery in the first degree and assault, but reversed the respondent's conviction and 15-year sentence for armed criminal action, thereby reducing the respondent's total sentence by five years, on the ground that convictions for both armed criminal action (use of a deadly weapon in the commission of a felony) and the predicate felony (in this case, robbery in the first degree) violated the double jeopardy clause of the Fifth Amendment of the United States Constitution. *State* v. *Hunter*, 622 S.W.2d 374, 375[1] (Mo.App., W.D. 1981). In reaching this conclusion, the Court of Appeals relied on a recent decision of the Missouri Supreme Court, *State* v. *Haggard*, 619 S.W.2d 44 (Mo. banc 1981).[1] See *State* v. *Hunter, supra*, 622 S.W.2d at 375.

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[1]A joint petition for a writ certiorari is presently pending before this Court as a result of the *Haggard* decision. *Missouri* v. *Haggard*, No. 81-625 (petition for certiorari filed Sept. 24, 1981). This petition also joins, pursuant to Rule 19.4, 22 other cases which were decided by the Missouri Supreme Court contemporaneously with the decision in *State* v. *Haggard, supra*. In addition to the petition filed by the State

(Continued on next page)

A. Evidence

The evidence in this case is set out in some detail in the opinion filed by the Missouri Court of Appeals. See *State* v. *Hunter, supra,* 622 S.W.2d at 375. For purposes of this petition, it will suffice to note of the evidence demonstrated that the respondent, along with two accomplices, entered an A & P Store at 75th & Wornall in Kansas City, Missouri, on November 24, 1978 and forced the store manager at gunpoint to open two safes in the area of the store near the manager's office. While the manager was complying with the respondent's demands, the respondent struck the manager twice with the butt of the revolver. A police officer interrupted the robbery while it was in progress, and ordered the three bandits to halt. The respondent answered by firing a shot at the policemen, and the officer returned the fire. Although the threesome escaped, the respondent was ultimately apprehended and identified by both the store manager and the police officer as one of the three individuals involved in the robbery. *State* v. *Hunter, supra,* 622 S.W.2d at 375. As a result of the respondent's participation in the robbery, the respondent was convicted, *inter alia,* of robbery in the first degree (the stealing of property from the person by force) and armed criminal action (commission of a felony, *i.e.,* the robbery, "with or through the use, assistance or aid of a deadly weapon") (J.A. 1-2, 10-12).

B. Procedural History

This case, as well as the others listed in footnote 1, *supra,* is an outgrowth of a long-standing controversy between the Missouri Supreme Court and the State of Mis-

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Footnote continued

of Missouri in *Missouri* v. *Haggard,* the State has filed two other petitions with this Court, involving the same issue, in *Wyrick* v. *Williams,* No. 80-2200 (petition for certiorari filed June 29, 1981), and *Missouri* v. *Kane,* No. 81-2117 (petition for certiorari filed May 7, 1982).

souri over the application of the double jeopardy clause to the prosecution and conviction of criminal defendants in Missouri for both armed criminal action, § 559.225, and, in the same trial, for the felony used to establish the armed criminal action charge (in this case, robbery in the first degree).

The armed criminal action statute was first passed in 1976; initial challenges to the act on double jeopardy grounds proved unsuccessful. *State* v. *Treadway*, 558 S.W.2d 646 (Mo. banc 1977), *cert. denied*, 439 U.S. 839, 99 S.Ct. 124, 58 L.Ed.2d 135 (1978); *State* v. *Valentine*, 584 S.W.2d 92, 96 (Mo. banc 1979). However, in *Sours* v. *State*, 593 S.W.2d 208 (Mo. banc 1980), the Missouri Supreme Court expressly overruled *Treadway* and *Valentine* and concluded that multiple convictions for both armed criminal action and the underlying felony violated the Fifth Amendment.

In response to the State of Missouri's petition for writ of certiorari, the decision of the Missouri Supreme Court in *Sours* (sometimes referred to as *Sours I*) was vacated by this Court on May 27, 1980, for reconsideration in light of *Whalen* v. *United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). *Missouri* v. *Sours*, 446 U.S. 962, 100 S.Ct. 2935, 64 L.Ed.2d 820 (1980). However, on remand, the Missouri Supreme Court reiterated its conclusion that cumulative punishments for both armed criminal action and the underlying felony constituted multiple punishment for the same offense. *Sours* v. *State*, 603 S.W.2d 592, 605-606 (Mo. banc 1980). On January 26, 1981, the State's petition for writ of certiorari was denied. *Missouri* v. *Sours*, 449 U.S. 1131, 101 S.Ct. 953, 67 L.Ed.2d 118 (1981).[2]

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[2]Two of the justices, Justice Blackmun and Justice Rehnquist, would have dismissed the petition as moot, *id.*, 449 U.S. at 1131, undoubtedly because Sours had fully served both sentences by the time the petition was ruled upon.

As a result of the court's decision in the second *Sours* case (sometimes referred to as *Sours II*), armed criminal action convictions were routinely reversed by Missouri appellate courts and, in most instances, the State sought review by certiorari from this Court. While those petitions were pending, this Court decided *Albernaz* v. *United States*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981), and ultimately granted certiorari in all of Missouri's pending petitions, and vacated the decisions for re-examination in light of *Albernaz*.[3] In response to these orders, the Missouri Supreme Court again reconsidered its holding, this time in *State* v. *Haggard, supra*, but remained unconvinced that its initial rulings were incorrect. *State* v. *Haggard, supra*, 619 S.W.2d at 51.

As previously noted, a petition for writ of certiorari is now pending before this Court as a result of the *Haggard* decision. However, in the interim, the Court of Appeals in the present case relied on *Haggard*, along with *Sours I* and *Sours II*, in reversing the respondent's conviction and 15-year sentence for armed criminal action on double jeopardy grounds. *State* v. *Hunter, supra*, 622 S.W.2d at 375[1]. Subsequent to the decision of the Court of Appeals in *Hunter*, the Missouri Supreme Court has continued to adhere to the position that the state legislature's "attempt to enhance or enlarge" a defendant's punishment under the armed criminal action statute[4] was "viola-

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[3]See *Missouri* v. *Counselman*, 450 U.S. 990, 101 S.Ct. 1690, 68 L.Ed.2d 190, (1981); *Missouri* v. *Brown*, 450 U.S. 1027, 101 S.Ct. 1735, 68 L.Ed.2d 222 (1981); *Missouri* v. *Greer*, 451 U.S. 1013, 101 S.Ct. 3000, 69 L.Ed.2d 385 (1981); *Missouri* v. *Sinclair*, 452 U.S. 912, 101 S.Ct. 3044, 69 L.Ed.2d 415 (1981); *Missouri* v. *Lowery*, 452 U.S. 912, 101 S.Ct. 3044, 69 L.Ed.2d 415 (1981); *Missouri* v. *Crews*, 452 U.S. 957, 101 S.Ct. 3103, 69 L.Ed.2d 968 (1981).

[4]The armed criminal action statute construed in *Kane* was § 571.015, RSMo 1978, a statute which became effective for crimes committed

(Continued on next page)

tive of the constitutional prohibition against double jeopardy" because it is "phrased in terms of separate crime or offense". *State* v. *Kane*, 629 S.W.2d 372, 377 (Mo. banc 1982)[5]

Footnote continued

on or after January 1, 1979. The statute is identical in all material respects to § 559.225, RSMo Supp. 1976, the armed criminal action statute involved in the present case.

[5]A consolidated petition for writ of certiorari is presently pending before this Court as a result of the Missouri Supreme Court's decision in *Kane*. See *Missouri* v. *Kane*, No. 81-2117 (petition for certiorari filed May 7, 1982).

SUMMARY OF ARGUMENT

The double jeopardy clause of the Fifth Amendment applies to the States through the Fourteenth Amendment and prohibits among other things, "multiple punishments for the same offense". But this protection, insofar as it is available to a defendant in a case involving a single prosecution for several statutory violations, committed in the same transaction, acts exclusively as a restraint on prosecutors and the courts and is designed to ensure that a defendant does not receive more punishment than the legislature intended to be imposed. In other words, the Fifth Amendment does not operate as a substantive limitation on the legislative power to define crimes and impose penalties for their violation. Although other provisions of the United States Constitution, such as the Eighth Amendment, restricts the legislative power in this area, the Fifth Amendment does not.

Accordingly, the conclusion of the Missouri Court of Appeals, Western District, that multiple punishments for the offense of armed criminal action (use of a deadly weapon during the course of a felony) and the underlying felony (in this case, robbery in the first degree), imposed in a single trial, violate the Fifth Amendment, despite a clear, positive and unequivocal legislative intent to punish a defendant under both statutes, is clearly erroneous and in conflict with several recent decisions of this Court, most notably *Whalen* v. *United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), and *Albernaz* v. *United States*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981).

In invalidating the respondent's conviction and 15-year sentence for armed criminal action on the ground that it constituted unconstitutional multiple punishment, the Missouri Court of Appeals relied on several previous de-

cisions of the Missouri Supreme Court, all of which interpreted *Blockburger* v. *United States*, 284 U.S. 229, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932), as a rule of substantive double jeopardy law, rather than a rule of statutory construction. Missouri courts have concluded that, by definition, all of the elements of the underlying felony automatically become elements of armed criminal action, and thus the predicate felony will always constitute a "lesser-included offense" of armed criminal action. Applying *Blockburger* as a constitutional touchstone, the Missouri courts have concluded that, since the predicate felony will never include an element not necessarily incorporated in the offense of armed criminal action, the *Blockburger* rule prohibits, as a matter of constitutional law, convictions for both the greater offense (armed criminal action), and the lesser crime (the predicate felony).

But *Whalen* and *Albernaz* clearly demonstrate that this analysis of the Fifth Amendment is seriously flawed. *Whalen* held that *Blockburger* is not a rule of substantive constitutional law, but rather only "a rule of statutory construction", and that even if, upon application of the *Blockburger* test, two crimes are found to constitute the "same offense", cumulative sentences will not be prohibited if "elsewhere specifically authorized" by the legislature. *Id.*, 445 U.S. at 693.

This Court's ruling in *Albernaz* is even more explicit. In discussing the role and scope of the double jeopardy clause, insofar as it prohibits "multiple punishments for the same offense" imposed at a single trial, this Court unequivocally held:

(1) that "[t]he *Blockburger* test is a 'rule of statutory construction' ", which, "because it serves as a means of discerning congressional purpose", is not "controlling

where, for example, there is a clear indication of contrary legislative intent." *Id.*, 450 U.S. at 340, 101 S.Ct. at 1143;

(2) that in considering the permissibility of multiple punishments for offenses arising out of the same transaction, "the 'dispositive question' [i]s whether Congress intended to authorize separate punishments for the two crimes." *Id.*, 450 U.S. at 344, 101 S.Ct. at 1145;

(3) that the " 'power to define criminal offenses and to prescribe punishments to be imposed upon those found guilty of them, resides wholly with the Congress.' " *Id.*, 450 U.S. at 344, 101 S.Ct. at 1145;

(4) that " 'where consecutive sentences are imposed at a single criminal trial," the role of the Fifth Amendment's prohibition against multiple punishments for the same offense, " 'is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishment for the same offense.' " *Id.*, 450 U.S. at 344, 101 S.Ct. at 1145; and

(5) that, as a result, "the question of what punishments are constitutionally permissible *is not different from* the question of what punishment the Legislative Branch intended to be imposed" and where, as here, there exists a legislative intent "to impose multiple punishment, imposition of such sentences does not violate the Constitution." *Id.*, 450 U.S. at 344, 101 S.Ct. at 1145. (emphasis added; footnote omitted.)

In the instant case, it is undisputed that the Missouri legislature intended that a defendant, who uses a dangerous or deadly weapon to commit a felony in the State of Missouri, should be sentenced and punished for both the felony he committed and the additional offense of armed criminal action. Since the legislature's intent in this respect is clear, there is no need to even resort to *Blockburger* or

any other rule of statutory construction. As *Albernaz* expressly states, "the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed"; accordingly, the intent of the Missouri legislature in this case is dispositive of the respondents's double jeopardy claim and requires that the decision of the Missouri Court of Appeals, Western District, be vacated.

ARGUMENT

I.

The double jeopardy clause of the Fifth Amendment does not bar the imposition, following a single trial, of sentences and convictions for both armed criminal action (the use of a weapon in the commission of a felony) and the felony used to prove the armed criminal action charge, since sentences and convictions for both offenses are specifically authorized by statute.

The issue presented by this case is an outgrowth of the seemingly endless controversy over the constitutionality of the multiple punishment provisions of Missouri's armed criminal action statute, § 559.225, RSMo Supp. 1976, which provides, in essence, that an individual who commits a felony "by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action", and which expressly provides that the punishment imposed pursuant to a conviction for armed criminal action "shall be in addition to" the punishment imposed for the commission of the felony used to prove the armed criminal action charge.

In a series of decisions beginning with *Sours* v. *State*, 593 S.W.2d 208 (Mo. banc 1980), the Missouri Supreme Court has held that multiple convictions and sentences for both armed criminal action and the underlying felony, imposed at a single trial, for conduct arising out of the same transaction, violates the double jeopardy clause of the Fifth Amendment on the theory that the dual convictions constitute "multiple punishment for the same offense". *Sours* v. *State, supra*, 593 S.W.2d at 210-223. At the direction of this Court, the Missouri Supreme Court has reconsidered this holding in several subsequent cases, including *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc 1980),

and *State* v. *Haggard*, 619 S.W.2d 44 (Mo. banc 1981), but on each occasion has adhered to the reasoning and result reached in its initial *Sours* opinion. In reversing the respondent's 15-year sentence for armed criminal action (which was ordered to run concurrently with his ten-year sentence for robbery in the first degree), the Missouri Court of Appeals expressly relied on the Missouri Supreme Court's prior decisions in the *Sours* cases and *State* v. *Haggard, supra*. *State* v. *Hunter*, 622 S.W.2d 374, 375[1] (Mo.App., W.D. 1981). Approximately two months prior to this Court's order granting certiorari in the instant case, the Missouri Supreme Court issued still another opinion holding that multiple punishments for armed criminal action, and the felony used to prove the armed criminal action charge, was "thereby violative of the constitutional prohibition against double jeopardy". *State* v. *Kane*, 629 S.W.2d 372, 373 (Mo. banc 1982).

In each of these opinions, the rationale employed by the court to invalidate multiple convictions for both armed criminal action and the predicate felony resulted from the court's erroneous interpretation of the rule of *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932), which provides that "where the same act or transaction constitutes a violation of two distinction statutory provisions, the test to be applied to determine whether they are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." The Missouri Supreme Court has consistently—and, in the petitioner's view, erroneously—interpreted this rule as a constitutional touchstone for determining the constitutionality of multiple punishments, imposed at a single criminal trial, for conduct committed during the course of the same transaction that violates more than one statute. The Missouri Supreme Court has repeatedly held that,

regardless of legislative intent, the Fifth Amendment's prohibition against double jeopardy prohibits multiple punishments for two offenses which are the "same" under the *Blockburger* rule. *Sours* v. *State, supra,* 593 S.W.2d at 213; *Sours* v. *State, supra,* 603 S.W.2d at 603-606; *State* v. *Haggard, supra,* 619 S.W.2d at 51.

Applying the "constitutional rule" of *Blockburger* to Missouri's armed criminal action statute, the Missouri Supreme Court has concluded that, by legislative definition, the underlying or predicate felony used to prove the armed criminal action charge is a "lesser included offense" of armed criminal action. *Sours* v. *State, supra,* 593 S.W.2d at 214, 223; *Sours* v. *State, supra,* 603 S.W.2d at 606. Accordingly, the Missouri Supreme Court has concluded that multiple punishments for both armed criminal action and the predicate felony are violative of the Fifth Amendment because, in the court's view, the imposition of separate sentences for both the lesser-included offense and the greater offense are prohibited by the Fifth Amendment. *Sours* v. *State, supra,* 593 S.W.2d at 213; *Sours* v. *State, supra,* 603 S.W.2d at 606.[6]

Unquestionably, the position of the Missouri Supreme Court is directly at odds with this Court's recent decisions in *Whalen* v. *United States,* 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), and *Albernaz* v. *United States,*

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[6]Using the same analysis, the Missouri Supreme Court has ruled that multiple punishments for both felony murder and the underlying felony violated the rule of *Blockburger* and were therefore in violation of the Fifth Amendment. *State* v. *Morgan,* 592 S.W.2d 796, 803[1, 2] (Mo banc 1980). After this Court vacated the decision in response to the State's petition for a writ of certiorari and remanded the case for reconsideration in light of *Whalen, Missouri* v. *Morgan,* 449 U.S. 809, 101 S.Ct. 56, 66 L.Ed.2d 12 (1980), the Missouri Supreme Court, on remand, reached the same result on the basis of legislative intent. *State* v. *Morgan,* 612 S.W.2d 1 (Mo. banc 1981).

450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981), which establish that the role of the double jeopardy clause, insofar as it protects against "multiple punishment for the same offense", imposed at a single criminal trial, is limited to assuring that the courts do not exceed their legislative authorization by assessing more punishment than the legislature intended to be imposed. *Albernaz* v. *United States*, *supra*, 450 U.S. at 344. The *Blockburger* test, this Court has emphasized, is simply a rule of statutory construction, not a constitutional touchstone. *Whalen* v. *United States*, *supra*, 445 U.S. at 691; *Albernaz* v. *United States*, *supra*, 450 U.S. at 340.

Since, as emphasized under subsection A, *infra*, of this brief, the Missouri legislature clearly intended to impose separate punishments and sentences for violations of both armed criminal action *and* the underlying felony, the imposition of concurrent ten and 15-year sentences against the respondent for both armed criminal action and robbery, at a single trial, did not violate the Fifth Amendment.

A.

Missouri's armed criminal action statute contains a clear, unambiguous expression of the state legislature's intent to punish for both the offense of armed criminal action and the predicate felony, and the Missouri Supreme Court has authoritatively construed the statute so as to authorize multiple punishments.

Unlike the problems experienced by this Court in *Albernaz*, *Whalen* and seemingly every other "multiple punishment" case this Court has previously decided, there is no need in this case to resort to mechanical rules of statutory construction, such as the *Blockburger* test, to determine whether multiple punishments were legislatively authorized. Missouri's armed criminal action statute,

§ 559.225, RSMo Supp. 1976 (now § 571.015, RSMo 1978), is clear on its face. After making it a separate offense to commit a felony "by, with, or through the use, assistance, or aid of a dangerous weapon", and providing a sentence of not less than three years as punishment for this offense, the statute provides:

> . . . The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance or aid of a dangerous or deadly weapon. . . .

In *Sours* v. *State, supra,* 593 S.W.2d at 216, the Missouri Supreme Court held that "[t]he General Assembly clearly intended that both § 559.225.1, RSMo Supp. 1976 . . . and the statute defining the underlying felony be applied to a defendant in a prosecution arising out of the single transaction." After this Court vacated and remanded the case for reconsideration in light of *Whalen*[7] the Missouri Supreme Court, on remand, reiterated its conclusion that multiple punishments and convictions were expressly authorized by § 559.225.1. In *Sours II* the court held that the Missouri legislature had expressed "in clear and unequivocal terms" its intent to punish a defendant for both armed criminal action and the underlying felony. *Sours* v. *State, supra,* 603 S.W.2d at 598.

This conclusion was repeated in *State* v. *Haggard, supra,* the case in which the Missouri Supreme Court reconsidered its earlier *Sours* rulings in light of *Albernaz.* In *Haggard,* the Missouri Supreme Court stated "that by enactment of these two statutes the Missouri legislature intended to twice punish the appellant". *State* v. *Haggard,*

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[7]See *Missouri* v. *Sours,* 446 U.S. 962, 100 S.Ct. 2935, 64 L.Ed.2d 820 (1980).

supra, 619 S.W.2d at 51. And, in *State* v. *Kane*, *supra*, 629 S.W.2d at 377, the court once again construed Missouri's armed criminal action statute as an unconstitutional "attempt to enhance" a defendant's punishment by creating a "separate crime or offense".

So this Court need not resort to guesswork or mechanical rules of statutory construction to resolve the question of legislative intent. The Missouri legislature has clearly authorized cumulative punishments for both armed criminal action and the underlying felony, and the only question before this Court is whether the imposition of such punishment, in a single trial, violates the Fifth Amendment's protection against multiple punishments for the same offense.

In view of this Court's recent decisions in *Whalen* and *Albernaz*, it is a question that is easily answered—where multiple punishments are legislatively authorized (as they are here), the imposition of those punishments, at a single trial, does not offend the double jeopardy clause.

B.

The Fifth Amendment's prohibition against "multiple punishments for the same offense" does not operate as a substantive limit on the legislative power to define crimes or impose punishments for their violation, but rather only protects a defendant from multiple punishments that exceed those authorized by the legislature.

The Fifth Amendment of the United States Constitution provides, *inter alia*, that no person shall "be subject to the same offence to be twice put in jeopardy of life or limb". The Fifth Amendment guarantee against double jeopardy is enforceable against the states through the Fourteenth Amendment. *Tibbs* v. *Florida*, ____ U.S. ____,

No. 81-5114, 31 Crim.L.Rptr. 3065 n. 1 (June 9, 1982); *Benton* v. *Maryland,* 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969); *Illinois* v. *Vitale,* 447 U.S. 410, 415, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980). The constitutional injunction against being "twice put in jeopardy" comprises at least three "separate but related" protections, *United States* v. *Scott,* 437 U.S. 82, 92, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978), each designed to safeguard different interests.[8] The Fifth Amendment guarantee against double jeopardy protects against a second prosecution for the same offense after acquittal; it protects against a second prosecution for the same offense after conviction; and it protects against multiple punishments for the same offense. *Albernaz* v. *United States, supra,* 450 U.S. at 343; *Illinois* v. *Vitale, supra,* 447 U.S. at 415; *North Carolina* v. *Pearce,* 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). The third of its three safeguards, the prohibition against multiple punishment for the same offense, was first recognized more than one hundred years ago in *Ex parte Lange,* 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1873), but despite the rule's "venerable antiquity", this Court, until recently, had never clearly identified the constitutional value or rationale upon which the rule was based.[9]

Dicta in several opinions of this Court had appeared to suggest that the double jeopardy clause might prevent the imposition of cumulative punishments even in situations in which the legislature clearly intended that multiple penalties be imposed for a single criminal transaction.

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[8]See Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences,* 78 Mich.L.Rev. 1001, 1062-1063 (1980); Westen & Drubel, *Toward a General Theory of Double Jeopardy,* 1978 Sup.Ct.Rev. 81, 84; Note, *Twice in Jeopardy,* 75 Yale L.J. 262, 265-266 (1965).

[9]Westen, *supra,* 78 Mich.L.Rev. at 1023-1024.

See *Simpson* v. *United States*, 435 U.S. 6, 11-13, 98 S.Ct. 909, 912-913, 55 L.Ed.2d 70 (1978); *Jeffers* v. *United States*, 432 U.S. 137, 155, 97 S.Ct. 2207, 2218, 53 L.Ed.2d 168 (1977) (plurality opinion). Relying on this *dicta* and language taken from a few of this Court's successive prosecution cases, such as *Brown* v. *Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), *Harris* v. *Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977), and *Illinois* v. *Vitale*, *supra*, some state courts erroneously concluded that the double jeopardy clause barred convictions for both the greater and lesser offenses, imposed at a single trial, regardless of legislative intent. See *Whalen* v. *United States*, *supra*, 445 U.S. at 698 n. 2 (Blackmun, J., concurring).

This Court took the first step toward clearing up the confusion in this area in *Whalen* v. *United States*, *supra*. In *Whalen* the defendant was simultaneously tried in the District of Columbia for the local offense of felony murder and the lesser-included felony of rape. He was convicted on both offenses and was given consecutive sentences of 20 years to life for felony murder, and 15 years to life for rape. In his arguments before this Court, the defendant contended (1) that Congress did not intend the two crimes to be separately punished, and (2) that even if Congress did so intend, the imposition of consecutive sentences subjected him to double punishment in violation of the double jeopardy clause.

A majority of this Court, while ruling for the defendant, refused to say (as Justice Blackmun said in concurrence) that the double jeopardy clause "*only*" serves to incorporate by reference whatever the legislature intends regarding the calculation of punishment;[10] similarly, the

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[10] *Whalen* v. *United States*, *supra*, 445 U.S. at 697 (Blackmum, J., concurring) (emphasis in original).

Court refused to say (as Justice White said in concurrence) that the case could be decided purely on statutory grounds.[11] Instead, the Court based its decision squarely on the double jeopardy clause, emphasizing the double jeopardy clause "at the very least" precludes a court from imposing multiple sentences whether the legislature intends a single sentence. *Whalen* v. *United States, supra,* 445 U.S. at 689. On the other hand, the Court also refused to say (as the defendant argued) that the double jeopardy clause defines punishments and sentences independently of legislative intent. Instead the Court emphasized that "the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the legislative branch has authorized." *Id.,* 445 U.S. at 688.

The Court noted in *Whalen* that the constitutional prohibition against "multiple punishments for the same offense" proscribes *unauthorized* multiple punishments. Discussing its decision in *Ex parte Lange, supra,* the court observed:

> "It is not at all uncommon, for example, for Congress or a state legislature to provide that a single criminal offense may be punished both by a monetary fine and by a term of imprisonment. In that situation, it could not be seriously argued that the imposition of both a fine and a prison sentence in accordance with such a provision constituted an impermissible punishment. But if a penal statute provided for a fine *or* a term of imprisonment upon conviction, a court could not impose both punishments without running afoul of the double jeopardy guarantee of the Constitution.

Whalen v. *United States, supra,* 445 U.S. at 688.

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[11] *Id.,* 445 U.S. at 696 (White, J., concurring).

In discussing the defendant's argument that his multiple convictions and sentences for both felony murder and the predicate felony (rape) violated the Fifth Amendment, the court in *Whalen* concluded that the "dispositive question" was whether Congress had intended that the defendant be twice punished. *Id.*, 445 U.S. at 688-689. The Court observed:

> . . . The Fifth Amendment guarantee against double jeopardy embodies in this respect simply one aspect of the basic principle that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress. [citations and footnote omitted.] If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates . . . the specific guarantee against double jeopardy".

Id., 445 U.S. at 689.[12]

Most significantly, the majority in *Whalen* refused to hold, as the defendant had suggested, that the *Blockburger* rule[13] was a rule of constitutional substantive law. On the

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[12]In a footnote, the Court observed that there were other constitutional provisions, such as the Eighth Amendment, which restrained the legislative power to define crimes and assess punishments. *Id.*, 445 U.S. at 689 n. 3.

[13]In *Blockburger* v. *United States*, *supra*, 284 U.S. at 304, the Court stated that "[t]he applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." Although *Blockburger* was a case involving statutory construction rather than double jeopardy, the rule originated in *Morey* v. *Commonwealth*, 108 Mass. 433 (1871), a successive-prosecu-

(Continued on next page)

contrary, the Court held, the yardstick mentioned in *Blockburger* was only "a rule of statutory construction" designed to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively. *Whalen* v. *United States, supra,* 445 U.S. at 691. The assumption underlying the rule, the Court observed, is that Congress ordinarily does not intend to punish the same offense under two different statutes. The Court then added:

> . . . Accordingly, where two statutory provisions proscribe the "same offense" they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent.

Id., 445 U.S. at 692.

Several paragraphs later, this Court repeated itself:

> . . . Accordingly, where two statutory offenses are not the same under the *Blockburger* test, the sentences imposed "shall, unless the Court expressly provides otherwise, run consecutively." *And where the offenses are the same under that test, cumulative sentences are not permitted, unless elsewhere specifically authorized by Congress.*

Id., 445 U.S. at 693 (emphasis added; footnote omitted.)

Applying the *Blockburger* test to the defendant's convictions for both felony murder and rape, this Court concluded that, under the applicable statutes, "[a] conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape." *Id.,* 445 U.S. at 693-694. Thus, this Court concluded that since

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Footnote continued
tion double jeopardy case, and had earlier been adopted by this Court in *Gavieres* v. *United States,* 220 U.S. 338, 342, 31 S.Ct. 421, 55 L.Ed. 489 (1910), also a successive-prosecution double jeopardy case.

felony murder and rape committed during the course of a murder were the "same offense" under *Blockburger*, it was to be presumed, in the absence of legislative intent to the contrary, that Congress did not intend multiple punishments for both offenses and that therefore such punishments would violate the double jeopardy clause of the Fifth Amendment. *Id.*, 445 U.S. at 694-695.[14]

Any questions concerning the effect of the Fifth Amendment's prohibition against "multiple punishment for the same offense" which might have been left unanswered in *Whalen*, were conclusively resolved in *Albernaz* v. *United States*, *supra*. In *Albernaz*, the defendants were convicted, in a single proceeding, of conspiracy to import marijuana and conspiracy to distribute marijuana and received consecutive sentences on each count. Both convictions stemmed from a single agreement, the objectives of which were to import marijuana and then to distribute it domestically. The defendants argued that Congress had not intended multiple punishments to be imposed in a situation such as theirs and that, even if it had such an intent, the double jeopardy clause of the Fifth Amendment prohibited the imposition of such punishment.

In rejecting both arguments, the Court emphasized, just as it previously had done in *Whalen*, that the *Blockburger* test (which has consistently been treated by Missouri courts as a matter of substantive constitutional law), was actually nothing more than " 'a rule of statutory construction' ", which, "because it serves as a means of discerning congressional purpose should not be controlling where, for example, there is a clear indication of contrary

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[14]Significantly, the Court, in rendering its decision in *Whalen*, eschewed reliance on *Harris* v. *Oklahoma*, *supra*, a case which held that the government may not, in *successive* prosecutions, convict a defendant of both felony murder and the underlying felony. *Harris* v. *Oklahoma*, *supra*, 433 U.S. 682-683.

legislative intent." *Albernaz* v. *United States, supra,* 450 U.S. at 340. The Court then held that the defendants' convictions for conspiracy to import marijuana and conspiracy to distribute marijuana were not the "same offense" under *Blockburger* because each offense required proof of an element that the other did not, *and* because the Court could find no evidence of legislative intent "contrary to the presumption which should be accorded to th[o]se statutes after application of the *Blockburger* test." *Albernaz* v. *United States, supra,* 450 U.S. at 340.

Having found, therefore, congressional intent to punish for both offenses, the Court then turned to the defendants' double jeopardy argument. The defendants contended that, notwithstanding the existence of a legislative intent to punish for both offense, the multiple punishments they received violated the double jeopardy clause of the Fifth Amendment. Although the Court reaffirmed its previous rulings that the double jeopardy clause protects against, *inter alia,* " 'multiple punishments for the same offense' ", *Albernaz* v. *United States, supra,* 450 U.S. at 343, the Court rejected the defendants' double jeopardy argument:

> Last Term in *Whalen* v. *United States, supra,* this Court stated that "the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishment the Legislative Branch has authorized." 445 U.S., at 688, 100 S.Ct., at 1436, *id.,* at 696, 100 S.Ct., at 1440 (WHITE, J., concurring in part and concurring in the judgment); *id.,* at 696, 100 S.Ct., at 1440 (BLACKMUN, J., concurring in the judgment). In determining the permissibility of the imposition of cumulative punishment for the crime of rape and the crime of unintentional killing in the course of rape, the Court rec-

> ognized that the "dispositive question" was whether Congress intended to authorize separate punishments for the two crimes. *Id.*, at 689, 100 S.Ct., at 1436. This is so because the "power to define criminal offenses and to prescribe punishments to be imposed upon those found guilty of them, resides wholly with the Congress." *Ibid.* As we previously noted in *Brown* v. *Ohio, supra,* "where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee [against multiple punishments for the same offense] is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." 432 U.S., at 165, 97 S.Ct., at 2225. Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishment, imposition of such sentences does not violate the Constitution.

Albernaz v. *United States, supra,* 450 U.S. at 344 (footnote omitted).

In a concurring opinion written by Justice Stewart, in which Justices Marshall and Stevens concurred, Justice Stewart took issue with the majority's conclusion that Congress or, presumably, a State legislature, could constitutionally provide for cumulative punishments even where the two crimes were the "same offense" under the *Blockburger* test. *Albernaz* v. *United States, supra,* 450 U.S. at 345 (Stewart, J., concurring). These three justices specifically objected to the Court's statement that "the question of what punishments are constitutionally permissible is not different from the question of what punishment the

Legislative Branch intended to be imposed",[15] and the following sentence which stated that "[w]here Congress intended as it did here to impose multiple punishment, imposition of such sentences does not violate the constitution." *Id.*, 450 U.S. at 345. Justice Stewart wrote that "[t]hese statements are supported by neither precedent or reasoning and are unnecessary to reach the Court's conclusion." *Id.*, 450 U.S. at 345. He then added:

> No matter how clearly it spoke, Congress could not constitutionally provide for cumulative punishments unless each statutory offense required proof of a fact that the other did not, under the criterion of *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306.

Id., 450 U.S. at 345.

Consequently, the express language of the majority opinion, together with the vigorous objections of Justice Stewart and the other two concurring justices, leave no room for quibble: where, as here, the legislature has authorized multiple punishments for armed criminal action and the underlying felony, multiple punishments for both offenses are permissible under *Albernaz*, even if the two crimes would normally be considered the "same offense" under *Blockburger* for double jeopardy purposes.

In essence, this Court articulated in *Whalen* and *Albernaz* what the State has been asserting throughout the

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[15]This statement of law appears to have been borrowed verbatim from Justice Blackmun's concurring opinion in *Whalen* v. *United States*, *supra*, where he urged the Court to expressly hold that "the question of what punishments are constitutionally permissible is not different from what punishments the Legislative Branch intended to be imposed." *Whalen* v. *United States*, *supra*, 445 U.S. at 698. Justice Blackmun reiterated this belief in his concurring opinion in *Busic* v. *United States*, 446 U.S. 398, 413, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980) (Blackmun, J., concurring).

course of this litigation: that the role of the Fifth Amendment, insofar as it safeguards a defendant against "multiple punishments for the same offense", imposed at a single trial, is limited to assuring that the defendant does not receive more punishment than the legislature intended to be imposed. Or to put it another way:

> . . .[T]he double jeopardy clause prohibits the state from punishing a person twice for conduct that, by law, can be punished only once. That is to say, the state may not "double up" on a defendant's sentence by punishing him "again" after he has fully served the proper sentence prescribed by law for an offense. The real task is to identify the source and content of the law that defines the proper sentence for proscribed conduct. One cannot know whether a defendant is being punished *twice* without knowing whether he has yet been fully punished *once*, and one cannot know whether a defendant has been punished once without identifying the law that governs sentences for a particular conduct.

Weston, *supra*, 78 Mich.L.Rev. at 1024.

In the instant case, of course, the law which governed the respondent's criminal conduct in this case was embodied in two separate statutes, § 559.225, RSMo Supp. 1976, and § 560.120, RSMo 1969. Since subsection 1 of § 559.225 expressly provided that the punishment imposed in that section was to be in addition to the punishment imposed for the underlying felony the respondent in this case could not have been *fully* punished once, until he was punished under both statutes.

Indeed, *Whalen* and *Albernaz* confirm what many legal commentators have suggested all along—that "double jeopardy's prohibition of multiple punishment would be

absurd as a substantive limitation on the legislature" and that legislative intent determines the number of convictable offenses for a particular course of conduct. Note, 75 Yale L.J., *supra*, at 302, 311.

In stubbornly clinging to its conclusion that *Blockburger* was a rule of substantive constitutional law and that the Fifth Amendment protected a defendant against convictions for both the greater and lesser offense, regardless of legislative intent, the Missouri Supreme Court dismissed this Court's holding in *Albernaz* as *"dicta"*, and insisted that this *"dicta"* was in conflict with prior decisions of this Court. *State* v. *Haggard, supra*, 619 S.W.2d at 50, 51. Of course, this Court's language in *Albernaz* concerning the scope of the double jeopardy clause in prohibiting multiple punishments for the same offense, was *"dicta"* only if the Missouri Supreme Court's characterization of the *Blockburger* rule as a rule of substantive constitutional law was correct. And *Albernaz*, of course, expressly holds to the contrary.

Furthermore, contrary to the contention of the respondent and the Missouri Supreme Court, this Court's decision in *Albernaz* was not inconsistent with its prior decisions concerning the question of multiple punishments for the same offense. For example, in *Iannelli* v. *United States*, 420 U.S. 770, 785 n. 17, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975), this Court emphasized that the test articulated in *Blockburger* serves the function "of identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction." And, in *United States* v. *DiFrancesco*, 449 U.S. 117, 139, 101 S.Ct. 426, 438, 66 L.Ed.2d 328 (1980), the majority of this Court stated that the constitutional protection against multiple punishments, as this doctrine has evolved from *Ex parte Lange, supra*, guarantees only that a defendant

"may not receive a greater sentence than the legislature has authorized." The Court in *DiFrancesco* noted:

> . . . As *Ex parte Lange* demonstrates, a defendant may not receive a greater sentence than the legislature has authorized. No double jeopardy problem would have been presented in *Ex parte Lange* if Congress had provided that the offense there was punishable by both fine and imprisonment, even though that is multiple punishment. [citations omitted.] The punishment authorized by Congress . . . is clear and specific and, accordingly, does not violate the guarantee against multiple punishment expounded by *Ex parte Lange*.

United States v. *DiFrancesco, supra,* 449 U.S. at 139.

Additionally, *Brown* v. *Ohio, supra,* a case often cited for the now discredited proposition that the *Blockburger* test is a rule of substantive constitutional law, also supports this Court's holding in *Albernaz*. Indeed, when the Court in *Albernaz* held that " 'where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the Court does not exceed its legislative authorization by imposing multiple punishment for the same offense,' " *Albernaz* v. *United States, supra,* 450 U.S. at 344, it was quoting directly from *Brown* v. *Ohio, supra,* 432 U.S. at 165. *Brown,* in fact, contains additional language supportive of the Court's constitutional holding in *Albernaz*—in *Brown* the Court noted that "the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors." *Brown* v. *Ohio, supra,* 432 U.S. at 165. The Court in *Brown* added that '[t]he legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments' ", subject to the qualification that "once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors or-

dinarily may not attempt to secure that punishment in more than one trial." *Id.*, 432 U.S. at 165.

What is or is not the "same offense" is, of course, a uniquely legislative determination. The *Blockburger* rule serves as a test to determine whether, in those instances where a defendant's conduct violates more than one statute, the legislature intended to make such conduct one or two offenses. But even in those instances where several statutes overlap to such an extent that they would normally be construed to prohibit the "same offense" under *Blockburger*, multiple punishments are not prohibited "where, for example, there is a clear indication of contrary legislative intent." *Albernaz* v. *United States*, *supra*, 450 U.S. at 344. This Court also said as much in *Whalen* v. *United States*, *supra*, 445 U.S. at 693, when it held that "where the offenses are the same under [the *Blockburger*] test cumulative sentences are not permitted, *unless elsewhere specifically authorized by Congress.*" (emphasis added).

As previously emphasized, the Missouri Supreme Court has steadfastly refused to recognize that *Blockburger* is solely a rule of statutory construction, not a constitutional litmus test for determining the permissibility of cumulative punishments in a single-prosecution case. By interpreting it as a rule of substantive constitutional law, the Missouri Supreme Court has, in effect, turned the rule inside out. Instead of using *Blockburger* as a guide to determine and enforce legislative intent, the Missouri Supreme Court stood the rule on its head and used it to *thwart* legislative intent. Thus, the Missouri Supreme Court has done what this Court has never done—sustained a constitutional claim of double punishment where it was clear that the legislature intended such multiple punishment. See Weston, *supra*, 78 Mich.L.Rev. 1027-1028 n. 82;

and see also, *United States* v. *DiFrancesco, supra,* 449 U.S. at 126-127.

In so doing, the Missouri Supreme Court dismissed the teachings of *Whalen* and *Albernaz* as either being not in point or constituting "*dicta*", and relied instead on successive prosecution cases such as *Harris* v. *Oklahoma, supra, Brown* v. *Ohio, supra,* and *Illinois* v. *Vitale, supra,* refusing to recognize that these decisions turned not on the issue of "multiple punishment", but rather on the fact that the punishment was assessed in separate prosecutions. For example, in *Brown* v. *Ohio, supra,* the Court emphasized that, even where multiple punishment is authorized by statute, "prosecutors ordinarily may not attempt to secure that punishment in more than one trial." *Brown* v. *Ohio, supra,* 432 U.S. at 165 (footnote omitted). The Court in *Brown* explained that, "[w]here successive prosecutions are at stake, the guarantee serves as 'a constitutional policy of finality for the defendant's benefit', and that this policy "protects the accused from attempts to relitigate the facts underlying a prior acquittal," and from "attempts to secure additional punishment after a prior conviction and sentence." *Brown* v. *Ohio, supra,* 432 U.S. at 165-166. The idea underlying the constitutional prohibition against successive prosecutions for the "same offense" is that the State, with all its resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty. *Green* v. *United States,* 355 U.S. 184, 187-188 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). And see also, *Tibbs* v. *Florida, supra,* 31 Crim.L. Rptr. at 3068 ("[r]epeated prosecutorial sallies would un-

fairly burden the defendant and create a risk of conviction through sheer governmental perserverence.") If the government is allowed to reprosecute a defendant, "it gains an advantage from what it learns at the first trial about the strength of the defense case and the weaknesses of its own." *United States* v. *DiFrancesco, supra,* 449 U.S. at 128.[16]

Certainly, the considerations that underlie the policy against successive prosecutions for the "same offense", are entirely different from the considerations which give rise to the protection against multiple punishments for the same offense in cases involving a single prosecution. Therefore, it is not inconsistent for this Court to say, as it did in *Iannelli, Whalen* and *Albernaz,* that the effect of *Blockburger* in single-prosecution cases involving claims of multiple punishment is merely a rule of statutory construction, and yet hold, as it did in *Brown* and *Vitale,* that where two offenses are the "same" under *Blockburger,* successive prosecutions will normally be barred. *Brown* v. *Ohio, supra,* 432 U.S. at 166; *Illinois* v. *Vitale, supra,* 447 U.S. at 416. Consequently, while it is accurate to say, as this Court did in *Brown,* that "[i]f two offenses are the same under [the *Blockburger*] test for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions", *Brown* v. *Ohio, supra,* 432 U.S. at 166, the reverse is not necessarily true. As *Whalen* and *Albernaz*

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[16]There also exists the possibility, of course, that, by prosecuting separately offenses which arise out of the same transaction, the defendant, will, in fact, wind up receiving more punishment than the legislature intended, because the jury may take into consideration, in assessing punishment in each trial, the entire criminal transaction (*i.e.*, both offenses), and not just the crime for which the defendant stands charged. In other words, the defendant would run the risk of being punished for both offenses in both trials.

clearly demonstrate, while the State may be precluded for prosecuting a defendant for a greater and a lesser-included offense in *successive* trials, regardless of legislative intent, the State is not foreclosed from prosecuting for both the greater and lesser offenses in a *single trial*, where such cumulative punishments are "specifically authorized" by the legislature. *Whalen* v. *United States, supra,* 445 U.S. at 693.

The teaching of *Whalen* and *Albernaz* is clear—the scope of the constitutional guarantee against multiple punishments for the same offense in single-prosecution cases is limited to preventing prosecutors from seeking, and the courts from imposing, more punishment than the legislature has expressly authorized. Thus, even if armed criminal action and the predicate felony were to be considered the "same offense" under the *Blockburger* test, the Fifth Amendment does not preclude multiple punishments for both offenses, since such punishments are expressly authorized by statute.[17]

C.

The Missouri Supreme Court's conclusion that multiple punishments for both armed criminal action and the predicate felony constitute unconstitutional multiple punish-

[17]The *Blockburger* rule would appear to have questionable utility, even as a rule of statutory construction, when applied to statutes defining "compound" and "predicate" offenses. See *Whalen* v. *United States, supra,* 445 U.S. at 708-709 (Rehnquist, J., dissenting). However, in view of this Court's decisions in *Harris* v. *Oklahoma, supra,* 433 U.S. at 683, and *Whalen* v. *United States, supra,* 445 U.S. at 693-694, it is clear that the crimes of armed criminal action and its predicate felony would be considered "greater" and "lesser" offenses for purposes of applying the *Blockburger* rule. But this question is merely academic in this case—in view of the Missouri legislature's clear, undisputed intent to punish for both offenses, resort to rules of statutory construction such as *Blockburger* are unnecessary.

ment, is contrary to this Court's decision in Brintley **v.** Michigan, **and inconsistent with this Court's treatment of other cases from Maryland and Delaware involving the identical issue.**

As this Court undoubtedly is aware, the question presented by this case is certainly not unique. In fact, this Court was called upon to resolve a similar issue in *Brintley* v. *Michigan*, 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979). In *Brintley*, this Court dismissed for want of a substantial federal question, the defendant's appeal from his multiple convictions for armed robbery under § 750.529, M.C.L.A., and a felony firearms violation under § 750.227(b), M.C.L.A., which were affirmed by a Michigan Supreme Court in the face of a double jeopardy claim identical to that made by the respondent in the instant case. *Wayne County Prosecutor* v. *Recorder's Court Judge*, 406 Mich. 374, 280 N.W.2d 793 (1979).

The defendant, like the respondent in the case at bar, had argued that his multiple convictions for armed robbery and a felony firearms violation contravened the Fifth Amendment's prohibition against multiple punishments for the same offense, a claim that was summarily rejected by this Court "for want of a substantial federal question." *Brintley* v. *Michigan, supra*, 444 U.S. at 948. Such a disposition rejects the specific challenges presented in the statement of jurisdiction and leaves undisturbed the original judgment appealed from. *Mandel* v. *Bradley*, 432 U.S. 173, 175, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977); *Hicks* v. *Miranda*, 422 U.S. 332, 343-345, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975). Although the Michigan statute (which is set out in Appendix A of the State's petition for writ of certiorari) differed slightly from Missouri's armed criminal action statute, the constitutional issue raised was identical, and therefore this Court's summary affirmance was binding

upon the Missouri Supreme Court. *Hicks* v. *Miranda, supra,* 422 U.S. at 344-345. But even though the appeal in *Brintley* was rejected on November 13, 1979—more than two months prior to the Missouri Supreme Court's decision in *Sours I* —the Missouri Supreme Court has consistently ignored the existence of this decision.[18]

Thus, even though this Court had held by its summary affirmance in *Brintley,* that a conviction for both a felony firearm violation, such as Missouri's armed criminal action statute, § 559.225, and its predicate or underlying felony did not violate the Fifth Amendment's prohibition against multiple punishments for the same offense, the Missouri Supreme Court (and the Court of Appeals in this case) has consistently ruled to the contrary, just as if *Brintley* had never been decided.

This Court's subsequent treatment of similar issues arising from cases in Missouri, Delaware and Maryland clearly demonstrates that its ruling in *Brintley* was no abberation. On March 23, 1981, the date this Court issued its decision in *Albernaz,* it also ruled on certiorari petitions from Missouri, Delaware and Maryland involving the same "multiple punishment" question that is presented in this case.[19]

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[18]The Missouri Supreme Court has recognized that Michigan had reached a contrary result in ruling on the constitutionality of the multiple punishment provisions of its felony firearms statute in *Wayne County Prosecutor* v. *Recorder's Court Judge, supra,* but has simply ignored this Court's summary affirmance of that decision *sub nom. Brintley* v. *Michigan, supra. Sours* v. *State, supra,* 593 S.W.2d at 217; *State* v. *Kane, supra,* 629 S.W.2d at 376.

[19]*Missouri* v. *Counselman,* 450 U.S. 990, 101 S.Ct. 1690, 68 L.Ed.2d 190 (1981); *Delaware* v. *Hunter,* 450 U.S. 991, 101 S.Ct. 1689, 68 L.Ed.2d 190 (1981); *Delaware* v. *Evans,* 450 U.S. 991, 101 S.Ct. 1689, 68 L.Ed.2d 190 (1981); *Whack* v. *Maryland,* 450 U.S. 990, 101 S.Ct. 1688, 68 L.Ed.2d 189 (1981).

In *Missouri* v. *Counselman, supra,* this Court, in a 6-to-3 decision, vacated opinions of the Missouri Court of Appeals which had relied on *Sours I* and *II* to reverse armed criminal action convictions, and remanded the cases to the Eastern District of the Court of Appeals "for further consideration in light of *Albernaz* v. *United States*". *Missouri* v. *Counselman, supra,* 450 U.S. at 990. Obviously, if the majority of this Court in *Albernaz* had considered the dispositive language of *Albernaz* mere *"dicta"* which was not binding on the Missouri Supreme Court, this remand would have made little or no sense. Furthermore, it is significant that the three justices who concurred in *Albernaz,* while expressing the opinion that a defendant could not constitutionally be punished for both the "greater" and the "lesser" offense in a single proceeding, regardless of legislative intent, dissented in *Counselman.*

Equally revealing is the fact that on the same day, this Court also reversed two Delaware cases where the Delaware Supreme Court, under virtually identical circumstances, had held that multiple convictions and punishments for both armed robbery and a felony firearms offense, stemming from the same transaction, constituted double jeopardy. *Delaware* v. *Hunter, supra,* 450 U.S. at 991; *Delaware* v. *Evans, supra,* 450 U.S. at 991. Justices Stewart, Marshall and Stevens again dissented in both cases. This Court also dismissed on March 23rd an appeal for want of jurisdiction or, in the alternative, denied certiorari, in a case from Maryland where the state court had held that multiple convictions and sentences for both armed robbery and a felony firearms offense had not constituted double jeopardy. *Whack* v. *Maryland, supra,* 450 U.S. at 990. Again, Justices Stewart, Marshall and Stevens disagreed with the action of the majority; they would have

"note[d] probable jurisdiction and [would have] set the case for oral argument."

The effect of these rulings, issued on the same day and by the same 6-to-3 configuration of justices that decided *Albernaz*, resulted in the vacation, on the basis of *Albernaz*, of those state court opinions which had reversed convictions for armed criminal action or felony firearms offenses on double jeopardy grounds, and left standing the lone decision (*Whack* v. *State*, 288 Md. 137, 416 A.2d 265 (Md.App., 1980)), that had reached a contrary result, *i.e.*, held that multiple convictions for both a felony firearms offense and the predicate felony did not violate the double jeopardy clause.

The significance of this action certainly was not lost on the Delaware Supreme Court. On May 12, 1981, the Delaware court responded by recognizing the clear import of *Albernaz* and concluded that multiple punishments for both a felony firearms offense and a predicate felony imposed at a single trial "does not violate the Double Jeopardy Clause of the Fifth Amendment." *Hunter* v. *State*, 430 A.2d 476, 481 (Del. 1981). See also, *Evans* v. *State*, 430 A.2d 481 (Del. 1981).[20] Dissatisfied with this turn of events, the defendant in *Hunter* petitioned this Court for writ of certiorari to review this decision, but his request was rejected by this Court. *Hunter* v. *Delaware*, ____ U.S. ____, 102 S.Ct. 519, 70 L.Ed.2d 390 (1981).

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[20]Also as a result of this Court's decision in *Albernaz*, the Supreme Court of Florida, which previously had held that the double jeopardy clause precluded convictions for both felony murder and the underlying felony, even in a single prosecution, reversed its earlier decisions and concluded that "it is now clear that the fifth amendment presents no substantive limitation on the legislature's power to prescribe multiple punishments, and that double jeopardy seeks only to prevent courts either from allowing multiple prosecutions or from imposing multiple punishments for a single, legislatively defined offense." *State* v. *Hegstrom*, 401 So.2d 1343, 1345 (Fla. 1981).

Of course, in reviewing its earlier decisions, the Missouri Supreme Court in *Haggard* refused to budge and contended that its prior rulings on the armed criminal action question were not affected by *Albernaz*. Thus, the Missouri Supreme Court remains the final holdout. Of the four states—Michigan, Maryland, Delaware and Missouri—which have litigated this issue before this Court in the last two years, only *Missouri* continues to hold—contrary to *Brintley, Whalen,* and *Albernaz*—that multiple convictions, imposed at a single trial, for both a felony firearms offense, such as Missouri's armed criminal action statute, and the predicate felony, violate the Fifth Amendment of the United States Constitution.[21]

D.

There is no rational basis for concluding that the test enunciated in Blockburger **is a rule of substantive constitutional law, as opposed to a rule of statutory construction, since the same result can be reached, and the rule circumvented, by careful legislative draftsmanship. The Missouri legislature, for instance, could have achieved the same result in this case, without offending the** Blockburger **rule, simply by redefining the offenses of robbery and armed criminal action as a single "crime" punishable by a single "sentence", but retaining the identical penalties that are presently contained in § 559.225, RSMo Supp. 1976, and § 560.135, RSMo Supp. 1975.**

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[21]See also, *Cassius* v. *Arizona,* 420 U.S. 514, 95 S.Ct. 1345, 43 L.Ed.2d 362 (1975), where a writ of certiorari was dismissed by this Court as having been improvidently granted. The Court had before it an Arizona statute which made it an offense to commit a felony while released on bail, and which provided for additional punishment to be imposed for the offense. The Supreme Court of Arizona had ruled that consecutive punishment in that instance did not constitute double jeopardy. *State* v. *Cassius,* 110 Ariz. 485, 520 P.2d 1109 (1974).

As emphasized under subsection B, *infra*, of the State's brief, the Missouri courts' unwillingness or inability to follow this Court's decisions in *Whalen* and *Albernaz* appears to stem, in part, from the mistaken premise that the Constitution contains its own independent standard for determining what constitutes the "same offense" for double jeopardy purposes, and that this immutable standard is expressed by the *Blockburger* rule. But the *Blockburger* test, of course, is nothing more than a rule of statutory construction, which is used to ascertain legislative intent in cases where a defendant's conduct violates more than one statute, but where it is unclear whether the legislature has intended multiple punishments for both offenses. *Albernaz* v. *United States, supra,* 450 U.S. at 340; *Whalen* v. *United States, supra,* 445 U.S. at 691; *Iannelli* v. *United States, supra,* 420 U.S. at 785 n. 17.

In *Sours II* the Missouri Supreme Court reluctantly acknowledged this holding in *Whalen,* but insisted that the *Blockburger* test also was a rule of substantive constitutional law. *Sours* v. *State, supra,* 603 S.W.2d at 595-597 n. 4. But obviously it cannot be both. It cannot, on one hand, serve as a rule to ascertain and enforce legislative intent, and, on the other, serve as a method of subverting that intent, as the Missouri courts have used it to thwart the state legislature's intent to cumulatively punish for both armed criminal action and the predicate felony. Furthermore, as a substantive rule, the *Blockburger* test affords a defendant no real protection at all, since the rule can be easily circumvented by legislative draftsmanship.

This case provides an excellent illustration of the point. In the instant case, the respondent received a sentence of ten years for first-degree robbery (under § 560.120, RSMo 1969, and §§ 560.135, RSMo Supp. 1975), and an additional "conviction" and concurrent 15-year sentence

for armed criminal action (under § 559.225, RSMo Supp. 1976) for using a deadly weapon to commit the robbery. The sum total of the respondent's punishment for his criminal conduct in committing the robbery with the deadly weapon: 15 years, two "convictions" and two sentences.

According to the Missouri Supreme Court, the supposed vice of Missouri's armed criminal action statute is that the additional punishment which § 559.225 authorizes for a defendant's use of a weapon during the commission of a felony is characterized by the statute as a separate "crime", punishable by a separate sentence. In *State* v. *Kane, supra,* the court recognized the legislature's right to add an additional term of years to the sentence of a defendant who committed a felony with a deadly weapon, so long as such punishment was not labeled as a second "crime" and assessed as a separate sentence. See *State* v. *Kane, supra*, 629 S.W.2d at 375-377. However, the court in *Kane* explained, the armed criminal action statute violated the Fifth Amendment's prohibition against multiple punishments for the same offense because it was "phrased in terms of separate crime or offense". *State* v. *Kane, supra,* 629 S.W.2d at 377.

In other words, the court in *Kane* found the statute unconstitutional because of the way it was *phrased.* Clearly, the court was concentrating on matters of form, rather than substance. Since the court's only objection to the present armed criminal action statute is that it labels the additional punishment which is to be imposed for the use of the weapon as a separate "crime", the Missouri legislature could avoid this objection, and the *Blockburger* rule, simply by repealing § 559.225 (now § 571.015, RSMo 1978), and enacting in its place the following statute:

> * * * [A]ny person who commits any felony under the laws of this state by, with, or through the use, assist-

> ance or aid of a dangerous or deadly weapon shall be punished by imprisonment by the division of corrections for a term of not less than three years, which term shall be added to any sentence imposed for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

This statute meets all of the Missouri Supreme Court's objections, since it does not create a separate "crime" of armed criminal action, or allow for the assessment of a second sentence. Nevertheless, if the respondent had been convicted under this statute, his situation would not have improved to any measurable degree. If the jury had assessed a ten-year sentence for robbery, and "enhanced" that sentence by 15 years because of the respondent's use of a deadly weapon to commit the robbery, the respondent would have received a total of 25 years imprisonment for using the weapon while committing a robbery, packaged in a single conviction and sentence. That, of course, was essentially the same punishment the respondent received in the instant case, but not quite. Since the respondent received the 25 years in two separate sentences, the trial court had the discretion to run them concurrently, discretion he utilized in this case, which meant that the effective length of the respondent's sentence for committing the robbery with a weapon was only 15 years—ten years fewer than he would have received under the aforementioned hypothetical statute.

The fact that, in the present case, the respondent has been convicted of two "crimes" and has received two separate sentences for criminal conduct which the state

legislature might just as easily have classified as a single "crime" with a single "sentence" is of no actual or constitutional significance. The terms "crime" and "sentence" are merely labels that are placed upon that increment of additional punishment that the legislature has authorized for the act of using a deadly weapon to commit a crime. As this Court emphasized in *Ex parte Lange*, *supra*, 85 U.S. (18 Wall.) at 173, "[i]t is the *punishment* that would legally follow the second conviction which is the real danger guarded against by the Constitution." (emphasis added.)

A defendant in Missouri who receives two convictions and consecutive sentences of ten and 15 years at a single trial for conduct arising out of the same transaction, is in no different position from a defendant who receives a single conviction and 25-year sentence for the identical conduct, except that the defendant in the latter instance may actually serve more time than the defendant in the first example, who may receive the benefit of concurrent sentences. Although the defendant in the first example will have received two, as opposed to one, sentences and convictions, the additional conviction and sentence carry with them no collateral consequences.[22]

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[22]The statutes dealing with the collateral consequences of conviction in Missouri are contained in Chapter 561, RSMo 1978. All of these statutes, §§ 561.016, 561.021, and 561.026, RSMo 1978, are triggered by a single conviction and are not affected by any subsequent convictions. Likewise, Missouri's recidivist statute, § 558.016, RSMo Supp. 1981, does not treat more harshly a defendant who receives more than one conviction as a result of a single criminal transaction. Although subsection 3 of § 558.016 creates the category of "persistent offender" for an individual who has been convicted of "two or more felonies", this subsection expressly provides that the felonies must have been "committed at different times." Consequently, if the respondent were to commit another offense in the future, only one of the convictions he received for his conduct in the instant case could be used to support the application of Missouri's recidivist statute.

Furthermore, even if the cumulation of "offenses" and "sentences" for conduct that could reasonably be punished as a single "offense" with a "single" sentence would result in additional punitive, collateral consequences to a defendant, the legislature could accomplish the same end simply by defining the conduct as a single offense, punishable by a single sentence *and* whatever collateral consequences resulted from the imposition of two convictions and sentences.

For example, suppose the Missouri legislature were to amend § 558.016.3 so as to delete the requirement that the two prior convictions needed to invoke the "persistent offender" provisions of the act must have been "committed at different times." See footnote 22, *supra*. Now the fact that the respondent received two convictions for robbing with a weapon, instead of only one, will have punitive, collateral consequences in the event he were to commit a subsequent crime. But the legislature could amend the armed criminal action statute to make committing a felony with a weapon a single crime, and still reach the same result. The legislature need only pass the hypothetical statute previously discussed with one additional sentence:

> A felony committed by, with, or though the use, assistance, or aid of a dangerous or deadly weapon shall be sufficient to invoke the "persistent offender" provisions of § 558.016, RSMo Supp. 1981, notwithstanding anything to the contrary appearing in that statute.

Again, the legislature will have achieved the same result in an armed criminal "enhancement" statute which would pass constitutional scrutiny by the Missouri Supreme Court, simply because, unlike the armed criminal statute

under which the respondent was convicted, the statute would provide for a single "crime", punishable by a single "sentence", and would not offend the *Blockburger* rule, since the statute would not purport to create a new "crime".

If these examples illustrate anything at all, they prove that the characterization of the *Blockburger* rule as a rule of substantive constitutional law cannot logically be defended, since such a constitutional rule, in fact, could not serve to shield the defendant from legislatively mandated "double punishment". The legislature, by careful draftmanship, could easily circumvent the rule so long as it created a single "crime", punishable by a single "sentence".

In short, the Missouri courts' "judicial veto" of § 559.225 (and its successor statute, § 571.015, RSMo Supp. 1981) will not effectively operate "as a substantive or penological restriction" on the state legislature, but only serves "as a literary critique" of its draftsmanship. Note, 75 Yale L.J., *supra,* at 302. There is no doubt that the legislature can define offenses and provide explicitly the penalty which will attach to a given type of conduct. The double jeopardy clause simply does not limit the legislature's power in this respect. While the Eighth Amendment protects a defendant against excessive punishment, if the legislature may constitutionally criminalize certain conduct and provide a particular penalty for that conduct, the Fifth Amendment does not preclude the legislature from dividing that conduct into two different offenses, punishable by separate sentences, and the only constitutional question is whether the *total* punishment imposed under the applicable statutes is excessive, or cruel and unusual, a question that invokes the provisions of the Eighth Amendment. See Westen & Drubel, *supra,* 1978 Sup.Ct.Rev.

at 114-115; and see *Gore* v. *United States*, 357 U.S. 386, 392-393, 78 S.Ct. 1280, 2 L.Ed.2d 1405 (1958). Although the Missouri legislature, by defining the use of a weapon to commit a felony as a separate "crime", punishable by a separate "sentence", might have exercised its legitimate penological power in a somewhat "roundabout" fashion"[23] this does not create a Fifth Amendment issue. The only real question is whether the total punishment authorized for the respondent's criminal conduct is excessive or constitutes cruel and unusual punishment under the Eighth Amendment. And, needless to say, the respondent makes no claim of "excessive" punishment, only "multiple" punishment.

Clearly, *Whalen* and *Albernaz* make it clear beyond dispute that the Fifth Amendment presents no substantive limitation on the legislature's power to prescribe multiple punishments, and that the double jeopardy clause only prevents courts either from allowing multiple prosecutions or from imposing multiple punishments for a single, legislatively defined offense. "To hold that the legislature might violate the Constitution by authorizing too many punishments for a single act 'demands more of the Double Jeopardy Clause than it is capable of supplying.' "[24]

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[23]Note, 75 Yale L.J., *supra*, at 302.

[24]*State* v. *Hegstrom*, *supra*, 401 So.2d at 1345, quoting Westen & Drubel, *supra*, 1978 Sup.Ct.Rev. at 113.

CONCLUSION

The respondent's convictions and concurrent sentences of 15 and ten years imprisonment, respectfully, for the offenses of armed criminal action, § 559.225, RSMo Supp. 1976, and robbery in the first degree, § 560.120, RSMo 1969; § 560.135, RSMo Supp. 1975, did not violate the double jeopardy clause of the Fifth Amendment, since such punishment, which was imposed in a single trial, was legislatively authorized. Accordingly, the decision of the Missouri Court of Appeals, Western District, which reversed the respondent's conviction and sentence for armed criminal action, should be vacated, and that conviction and sentence should be ordered reinstated.

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Respondent's Brief

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No. 81-1214

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF MISSOURI,

Petitioner,

VS.

DANNY HUNTER,

Respondent.

ON WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT.

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the multiple punishment for the same offense protection of the Double Jeopardy Clause prohibits in a single prosecution the imposition of punishment, which the legislature intended, under two statutes, violated in one transaction, that are the same offense as defined in *Blockburger v. United States,* 284 U.S. 299 (1932).

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STATEMENT OF THE CASE

Respondent adopts as his Statement of the Case the statements found in the Brief for Petitioner, 3-8, and the Brief for the United States as Amicus Curiae, 4-7, with the following additions. Respondent, during November of 1978, jumped over the courtesy booth of an A & P Food Store in Kansas City, Missouri, demanded money of the manager, Vincent Ponchur, who was inside the booth, got some from the cash drawer, hit the manager above his right ear with a gun after demanding the store safe to be opened, and got some more money in a cloth, bank moneybag from the safe (Tr. 157-161, 163-166). Respondent was charged with, found guilty of, and sentenced for the first degree robbery of Vincent Ponchur (J. A. 1-2, 4, 7, 10-12) and committing the first degree robbery of Vincent Ponchur with the use of a weapon (J. A. 2, 3, 8, 10-12).

SUMMARY OF ARGUMENT

The multiple punishment for the same offense protection of the Double Jeopardy Clause prohibits not only punishing under one statute more than the legislature intended and punishing under two statutes when the legislature did not intend it, but also punishing under two statutes, though that is what the legislature did intend, when the two statutes are only different descriptions of the same offense.

The Blockburger test, a required evidence test, is the test this Court uses to determine whether two statutes are the same offense within the meaning of the Double Jeopardy Clause. When each statute requires proof of a different element, the statutes are separate offenses. But when each

statute does not require proof of a different element, the statutes are the same offense. The Blockburger test does not inform a state of what elements its statutes are comprised, for that determination is made by the state court. Once the elements of two state statutes have been ascertained, then the Blockburger test must be used to determine whether the statutes are separate offenses or the same offense.

The Blockburger test in its role as a rule of statutory construction to determine whether the legislature has authorized punishment under two statutes is only secondary to and derivative from its role as a rule of Constitutional magnitude to determine whether two statutes are the same offense. The question of what punishment is unconstitutionally multiple cannot be entirely separated from the question of what punishment the legislature has authorized. When two statutes are separate offenses, legislative authorization of punishment under each is presumed from their being separate offenses and punishment under each is constitutionally permissible. But when two statutes are the same offense, an express declaration of legislative intent is required to authorize punishment under each.

Even if the legislature were to expressly authorize punishment under two statutes that are the same offense, punishment under each is unconstitutional, because the multiple punishment for the same offense protection of the Double Jeopardy Clause is a restraint or a limitation upon the legislature. Double jeopardy does not limit the power of the legislature to define crimes and fix punishments, because it is not the creation of a new crime or the fixing of punishment for it that offends the Constitution. The provision that an accused be convicted or punished for both the new crime and some other crime that is the same offense

offends the Constitution. This is the holding of *Sours v. State (Sours I),* 593 S.W.2d 208 (Mo. banc 1980). Missouri's armed criminal action statute, determined to be the same offense as the felony underlying it since that felony contained no element not in armed criminal action, was not struck down entirely. Only that provision of the statute expressly authorizing punishment for armed criminal action in addition to the punishment for the underlying felony was struck down. Conviction and punishment for armed criminal action alone exists in Missouri. The reversal of the armed criminal action, rather than the underlying felony, conviction was the remedy chosen to eliminate the multiple punishment, because in excess of ninety-five percent of the cases the punishment for armed criminal action (in effect, additional punishment for committing a felony through the use of a weapon) was less than that for the underlying felony.

The Fifth Amendment is different from the Eighth Amendment. The cruel and unusual punishment protection of the Eighth Amendment prohibits an amount of punishment that is excessive. The multiple punishment for the same offense protection of the Double Jeopardy Clause prohibits the distribution of an amount of punishment, regardless of whether the amount may be excessive, through more than one statute when the statutes are only different descriptions the same offense. The statute whoever is convicted of crime X shall be punished by ten years imprisonment and by an additional five years imprisonment does not violate double jeopardy, because the amount of punishment is not distributed through more than one statute. The statute whoever commits crime X shall be punished by ten years imprisonment and an additional five years imprisonment for committing crime Y, crime X being

a lesser-included offense of crime Y, does violate double jeopardy, because it distributes an amount of punishment, fifteen years, through two statutes, X and Y, that are the same offense. Because Missouri's armed criminal action statute could have been drafted so as to not violate the multiple punishment for the same offense protection, but to still provide for additional punishment for committing a felony through the use of a weapon, does not mean that the constitutional defect in the armed criminal action statute disappears or that the multiple punishment for the same offense protection is nonexistent. Therefore, Fifth Amendment analysis is not a literary critique of legislative draftsmanship, but this Court rather than the legislature determining the meaning of the Constitutional phrase the same offense.

Brown v. Ohio, 432 U.S. 161 (1977) is not authority for the proposition that in the single prosecution context double jeopardy is limited only to assuring that courts do not impose more punishment than the legislature has authorized, because the Ohio legislature had not expressed an intention to punish for each day the offense of joyriding continued. Nor is it authority for the proposition that in the successive prosecution context double jeopardy serves a constitutional policy of finality in an aspect other than that of reinforcing the multiple punishment for the same offense protection. This Court declared that it was protecting Brown's interest in avoiding multiple punishment rather than his interest in terminating the proceedings before a particular tribunal or in avoiding the repetition of proof.

Missouri's claim — that in the single prosecution context the Blockburger test is solely a rule of statutory construction, but that in the successive prosecution context it is a rule of Constitutional magnitude — leads to the abolition

of the protection against multiple punishment for the same offense. If this Court were to accept Missouri's claim, then it would have abandoned its duty to determine the meaning of the Constitutional phrase the same offense to the Missouri General Assembly, which could bifurcate its meaning in the sense that, by merely expressing its intent to punish under the two statutes, two statutes that are the same offense in a successive prosecution are not the same offense in a single prosecution. Missouri's claim also leads to the abolition of the protection against reprosecution after conviction for the same offense. The Double Jeopardy Clause does not protect in the reprosecution after conviction context, as an aspect of a constitutional policy of finality, the defendant's interest in avoiding the repetition of proof. Double jeopardy is not a compulsory rule of joinder. The test for determining when two statutes are the same offense is a required, not an actual, evidence test. *In re Nielson,* 131 U.S. 176 (1889) does not stand for a definition of the phrase the same offense broader than that of Blockburger. The clause would not protect the defendant's interest in terminating the proceedings before a particular tribunal, because that interest would be outweighed by the state's counterbalancing interest in punishing the guilty. In any event, these competing interests would never be balanced if the legislature were to authorize the successive prosecution of statutes that are the same offense.

There is no decision of this Court that is a controlling precedent for *State v. Haggard,* 619 S.W.2d 44 (Mo. banc 1981), relied upon by the court below in *State v. Hunter,* 622 S.W.2d 374 (Mo. App. 1981). *Albernaz v. United States,* 450 U.S. 333 (1981) is not a controlling precedent (the holding of Haggard), because the two statutes in Albernaz (conspiracy to import marijuana and conspiracy

to distribute marijuana) are separate offenses, whereas the two statutes in Haggard (first degree robbery and armed criminal action) are the same offense. The Albernaz language "the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed" is in the context of separate offenses correct, but in the context of the same offense dicta, not binding authority that should have controlled the judgment of the court below. *Whalen v. United States,* 445 U.S. 684 (1980) is not a controlling precedent (the holding of *Sours v. State (Sours II),* 603 S.W.2d 592 (Mo. banc 1980)), because the legislature had not authorized punishment under each statute in Whalen, whereas it had in Haggard. *Brintley v. Michigan,* 444 U.S. 948 (1979) is not a controlling precedent, because it is a summary disposition, binding only upon lower courts reviewing convictions under the Michigan felony-firearm and underlying felony statutes, and because those statutes are separate offenses. *Whack v. Maryland,* 450 U.S. 990 (1981) is not a controlling precedent, because it is a dismissal of an appeal for want of jurisdiction or a denial of certiorari, from which no implication of this Court's views on the merits may be drawn, and because the Maryland use of a handgun in the commission of a felony and underlying felony statutes are separate offenses.

Thus this Court, recognizing the power of the legislature to define crimes and fix punishments and not relying upon its judgment concerning the wisdom of punishing additionally those who commit a felony through the use of a weapon, must undergo the ordeal of judgment and bring, cautiously and with respect for the legislature, the legislative power to the judgment of the superior power of the

Constitution and declare the multiple punishment provision of Missouri's armed criminal action statute violative of the multiple punishment for the same offense protection of the Double Jeopardy Clause.

ARGUMENT

THE MULTIPLE PUNISHMENT FOR THE SAME OFFENSE PROTECTION OF THE DOUBLE JEOPARDY CLAUSE PROHIBITS PUNISHING UNDER TWO STATUTES, THOUGH THAT IS WHAT THE LEGISLATURE INTENDED, WHEN THE TWO STATUTES ARE ONLY DIFFERENT DESCRIPTIONS OF THE SAME OFFENSE AS DEFINED IN *BLOCKBURGER V. UNITED STATES*, 284 U.S. 299 (1932).

The Double Jeopardy Clause of the Fifth Amendment — "nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb" — protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishment for the same offense. *North Carolina v. Pierce,* 395 U.S. 711, 717 (1969). These protections are "separate but related." *United States v. Scott,* 437 U.S. 82, 92 (1978).

The multiple punishment for the same offense protection prohibits punishing under one statute more than the legislature intended. In *Ex parte Lange,* 18 Wall. (85 U.S.) 163 (1874), a prosecution for stealing mail belonging to the United States post office, the punishment for which was fixed by statute to be not more than one year imprisonment or a fine of not less than $10 nor more than $200, this Court

prohibited the imposition of a punishment (one year imprisonment in addition to a $200 fine) not authorized by the legislature.

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense . . . there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense.

Ex parte Lange, supra, 18 Wall. (85 U.S.) at 168.

The multiple punishment for the same offense protection prohibits punishing under two statutes when the legislature did not intend it. In *Whalen v. United States,* 445 U.S. 684 (1980), a prosecution for rape and killing the same victim in the perpetration of rape, this Court prohibited the imposition of punishment under each statute, because the legislature had not authorized punishment for both offenses since each statute did not require proof of a fact that the other did not. *Whalen, supra,* 445 U.S. at 690-691, 693-694. In speaking of the Blockburger rule, the test which this Court announced in *Blockburger v. United States,* 284 U.S. 299, 304 (1932) and which this Court uses to determine the meaning of the phrase same offense in the Double Jeopardy Clause, this Court stated:

> The assumption underlying the rule is that Congress does not ordinarily intend to punish the same offense under two different statutes. Accordingly, where two statutory provisions proscribe the "same offense," they are construed not to authorize cumulative punishment in the absence of a clear indication of contrary legislative intent.

Whalen, supra, 445 U.S. at 691-692.

The question presented in this case is whether the multiple punishment for the same offense protection of the Double Jeopardy Clause provides *more* protection than prohibiting punishment under one statute more than the legislature intended or under two statutes when the legislature did not intend it. The question is whether the multiple punishment for the same offense protection prohibits punishing under two statutes, though that is what the legislature intended, when the two statutes are the same offense. If it does, then respondent has been multiply punished, because he was sentenced under two statutes (ten years for first degree robbery, fifteen years for armed criminal action) that are the same offense. In other words, is the multiple punishment for the same offense protection limited only to assuring that courts do not impose more punishment than the legislature has authorized or is that assurance "the very least," *Whalen, supra,* 445 U.S. at 689, protection it provides.

1. The Blockburger test in its role as a rule of statutory construction to determine whether the legislature has authorized punishment under two statutes is only secondary to and derivative from its role as a rule of Constitutional magnitude to determine whether two statutes are the same offense.

In *Blockburger v. United States,* 284 U.S. 299, 304 (1932) (emphasis added), a single prosecution for selling a forbidden drug not in or from the original stamped package and selling a forbidden drug not in pursuance of a written order of the person to whom the drug is sold, this Court stated:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct

> statutory provisions, the test to be applied to determine whether there are two offenses or only one, is *whether each provision requires proof of an additional fact which the other does not.*

This Court, applying the test, held that each of the statutes required proof of a different element and thus there were two offenses, though violated by one sale, for which two punishments could be imposed. *Blockburger, supra,* 284 U.S. at 304.

The Blockburger rule is a required evidence test for determining when two statutes are the same offense.When one act violates two statutes, to determine whether the two statutes are the same offense the proof required by each statute is compared. It is the elements of a statute that indicate what proof is required to show a violation of the statute. Therefore, the elements of both statutes are compared. Each statute must require proof of a different element. *Illinois v. Vitale,* 447 U.S. 410, 416 (1980); *Iannelli v. United States,* 420 U.S. 770, 785 n. 17 (1975). If each statute does require proof of a different element, then the statutes are, in the words of *Gore v. United States,* 357 U.S. 386, 392 (1958) "separate offenses . . . and not merely different descriptions of the same offense. . . ." If each statute does not require proof of a different element, then the statutes are the same offense.

The Double Jeopardy Clause is applicable to the states through the Fourteenth Amendment. *Benton v. Maryland,* 395 U.S. 784, 793-796 (1969). The Constitution of the State of Missouri separates the powers of its state government into a Legislative, an Executive and a Judicial Branch. Art. II, §1; Art. III, §1; Art. IV, §1; Art. V, §1 Mo. Const. (1945). *See, Whalen v. United States,* 445 U.S. 684, 689 n. 4 (1980). Therefore, the United States Con-

stitution, through the Fifth and Fourteenth Amendments, prohibits the State of Missouri from imposing punishment for the same offense as defined in Blockburger. Missouri is required to use the Blockburger test, a required evidence test in which the elements of two statutes are compared, to determine whether punishment may be imposed for each of two Missouri statutes. The federal constitution does not, however, inform Missouri of what elements its statutes are comprised, for the determination of the elements of a state statute is made by the state court. *Brown v. Ohio,* 432 U.S. 161, 167 (1977); *Mullaney v. Wilbur,* 421 U.S. 684, 690-691 (1975); *Memorial Hospital v. Maricopa County,* 415 U.S. 250, 255-256 (1974). It merely informs Missouri of the test it must use, once it has ascertained the elements of its statutes, to determine whether its statutes are separate offenses or the same offense.

Though Blockburger did not even mention the Fifth Amendment, its test is the one this Court uses to determine whether two statutes are the same offense within the meaning of the Double Jeopardy Clause, whether they be brought in a single, which is more often the case, or a successive prosecution. *Sours v. State (Sours II),* 603 S.W.2d 592, 596 n. 4 (Mo. banc 1980). With respect to a single prosecution, *Gore v. United States,* 357 U.S. 386 (1958) is the leading case. The defendant in Gore was charged in a single prosecution with two counts each of 1.) sale of narcotic drugs not in pursuance of a written order, 2.) sale of narcotic drugs not in the original stamped package or from the original stamped package (the same two statutes as in Blockburger), and 3.) facilitating concealment and sale of narcotic drugs with knowledge they had been unlawfully imported. These sales arose out of two transactions, two apart from one another. *Gore, supra,* 357 U.S. at 387. The

defendant argued that Congress did not intend for punishment to be imposed under each of the three statutes, but only under one, when all three statutes were violated in a single transaction. This Court rejected the argument.

> It seems more daring than convincing to suggest that three different enactments . . . somehow or other ought to have carried with them an implied indication by Congress that if all . . . three . . . were disregarded but, forsooth, in . . . one transaction, the defendant should be treated as though he committed only one . . . .

Gore, supra, 357 U.S. at 390-391. Apparently realizing that the Blockburger test would permit punishment under each of the three statutes, the defendant also argued that the test itself offended the Double Jeopardy Clause, but that the clause, nevertheless, in some other manner prohibited punishment under each of the three statutes. This Court rejected the argument.

> Finally, we have had pressed upon us that the Blockburger doctrine offends the constitutional prohibition against double jeopardy. Certainly if punishment for each of separate offenses as those for which the petitioner here has been sentenced, and not merely different descriptions of the same offense, is constitutionally beyond the power of Congress to impose, not only Blockburger but at least the following cases would also have to be overruled.

Gore, supra, 357 U.S. at 392. Thus punishment for each of separate offenses, those not the same offense as defined in Blockburger, is constitutionally permissible.

A remarkably similar single prosecution case is *Albernaz v. United States,* 450 U.S. 333 (1981). The defendants in Albernaz were charged in a single prosecution with conspiracy to import marijuana and conspiracy to distribute

marijuana. These conspiracies arose out of a single agreement. The defendants argued, as did the defendant in Gore, that Congress did not clearly intend for punishment to be imposed under each of these statutes, when the dual objectives of importation and distribution arose out of a single agreement or conspiracy. The defendants advanced a basis for finding, as the defendant in Gore did not, this supposed lack of Congressional intent — a silent legislative history about whether Congress intended to authorize punishment under both statutes. *Albernaz, supra,* 450 U.S. at 336, 340-341. This Court rejected the argument. First, applying the Blockburger test as a rule of statutory construction to determine whether Congress intended to authorize punishment under each statute, *Albernaz, supra,* 450 U.S. at 337, it concluded that the statutes each require proof of a different element and thus that punishment under each statute was Congressionally authorized. *Albernaz, supra,* 450 U.S. at 339. Then, this Court rejected the defendant's argument that this authorization was not clear, because of Congressional silence, by declaring that when Congress is silent, it "was aware of the Blockburger rule and legislated with it in mind." *Albernaz, supra,* 450 U.S. at 340-342. Thus the conclusion in Albernaz about the defendants' lack of clear legislative intent argument is merely an explicit statement of what was implied in Gore about a similar argument — when two statutes are separate offenses, no express declaration of legislative intent is required to authorize punishment under each, but the authorization of punishment under each is presumed from their being separate offenses. The Blockburger test, then, is a rule of statutory construction only in a secondary and a derivative sense. Its role in determining whether the legislature has authorized punishment under two statutes is secondary to and derivative from its role in determining whether two statutes are the same offense.

The defendants in Albernaz, like the defendant in Gore, also argued that the Double Jeopardy Clause prohibited punishment under each of the two statutes, not because the Blockburger test offended the clause, but because the two statutes, under the Blockburger test, were the same offense. Noting that the established test for determining whether two statutes are the same offense is the Blockburger test, this Court rejected the argument and held that conspiracy to import and conspiracy to distribute marijuana were separate offenses. *Albernaz, supra,* 450 U.S. at 344 n. 3. Thus the conclusion in Albernaz about the defendants' double jeopardy argument is identical to the conclusion made in Gore — punishment for each of separate offenses, those not the same offense as defined in Blockburger, is constitutionally permissible.

With respect to successive prosecution, the leading case, making the Blockburger test the one required by the Double Jeopardy Clause to determine whether two statutes are the same offense, is *Brown v. Ohio,* 432 U.S. 161 (1977). The defendant in Brown stole an automobile in one city and nine days later was caught driving it in another. He was first prosecuted, convicted and punished for joyriding under Ohio law. He was then successively prosecuted, convicted and punished in another venue for stealing a motor vehicle under Ohio law. Though agreeing with the defendant that under Ohio law joyriding was a lesser-included offense of auto theft (every element of the lesser offense was an element of the greater) and that for the purposes of double jeopardy the two statutes were the same offense, the Ohio court held that because the statutes were violated on separate days, the double jeopardy clause was not offended. *Brown, supra,* 432 U.S. at 162-164. Mindful that the Ohio court had the final authority to interpret Ohio legislation, this Court,

applying the Blockburger test, agreed with the Ohio court that the two statutes were the same offense within the meaning of the clause, *Brown, supra,* 432 U.S. at 167-168, but disagreed with the Ohio court that the violation of the two statutes on separate days saved the second prosecution from being a double jeopardy violation. This Court held that "[t]he Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." *Brown, supra,* 432 U.S. at 169. Thus punishment for same offenses, as defined in Blockburger, is unconstitutional.

Whalen v. United States, 445 U.S. 684 (1980) made clear that the question of what punishment is unconstitutionally multiple cannot be separated from the question of what punishment the legislature has authorized. The defendant in Whalen was prosecuted, convicted and sentenced in a single proceeding for both rape and killing the same victim in the perpetration of rape, federal statutes applicable only within the District of Columbia. The defendant argued that Congress did not intend for punishment to be imposed under both statutes and if it did, that intention violated the Double Jeopardy Clause's prohibition against multiple punishment for the same offense. *Whalen, supra,* 445 U.S. at 686-687.

First, this Court distinguished federal statutes, federal statutes applicable only within the District of Columbia and state statutes, and the different scope of review this Court afforded lower court construction of those statutes. This Court would review a federal court of appeal's construction of a federal statute. This Court would be jurisdictionally barred from reviewing a state court's construction of a state statute. This Court as a matter of judicial policy would defer to a District of Columbia Court of Appeals's construction of a federal statute applicable only within the District, but would not be required to do so. *Whalen, supra,* 445 U.S. at 687-

688. This Court elected to review the District of Columbia Court of Appeals's construction of the two statutes involved, not because the judicial policy of deference would have permitted it, but because the Constitution required it. "[T]he petitioner's claim under the Double Jeopardy Clause cannot be separated entirely from a resolution of the question of statutory construction." *Whalen, supra,* 445 U.S. at 688.

Secondly, this Court explained why the question of statutory construction (what punishment the legislature has authorized) cannot be separated from the question of double jeopardy (what punishment is unconstitutionally multiple). "At the very least . . ." the Double Jeopardy Clause prohibits courts from imposing punishment that the legislature has not authorized, because the clause embodies the principle that "the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress." *Whalen, supra,* 445 U.S. at 689. Thus the conclusion in Whalen that the clause at the very least prohibits courts from imposing sentences not authorized by the legislature is merely a restatement of the principle of Ex parte Lange, which struck down the imposition of a punishment not authorized by the legislature.

Finally, this Court, applying the Blockburger test as a rule of statutory construction that had been codified into the District of Columbia Code, held that Congress did not authorize punishment for both rape and killing the same victim in the course of rape since each statute did not require proof of a fact that the other did not. *Whalen, supra,* 445 U.S. at 690-691, 693-694. In speaking of the Blockburger rule, this Court stated:

> The assumption underlying the rule is that Congress does not ordinarily intend to punish the same offense

> under two different statutes. Accordingly, where two statutory provisions proscribe the "same offense," they are construed not to authorize cumulative punishment in the absence of a clear indication of contrary legislative intent.

Whalen, supra, 445 U.S. at 691-692. Thus the conclusion in Whalen — when two statutes are the same offense, an express declaration of legislative intent is required to authorize punishment under each — is merely the converse of the conclusion in Albernaz — when two statutes are separate offenses, no express declaration of legislative intent is required to authorize punishment under each.

Because this Court agreed with the defendant's statutory construction argument in Whalen, it did not need to decide the defendant's double jeopardy argument. In Gore, Albernaz and Whalen, the defendants argued first that Congress did not intend for punishment to be imposed under each statute and secondly that if Congress did so intend, the multiple punishment for the same offense protection prohibited punishment under each statute. In Gore and Albernaz, this Court found a Congressional intent to punish under each statute (presumed from their being separate offenses and the absence of a clear indication of contrary legislative intent) and thus had to address the defendants' double jeopardy argument. Punishment under each statute was constitutionally permissible, because they were separate offenses. In Whalen, this Court found no Congressional intent to punish under each statute (presumed from their being the same offense and the absence of a clear indication of contrary legislative intent) and thus did not have to address the defendant's double jeopardy argument. In *Jeffers v. United States,* 432 U.S. 137, 149-150, 155 (1977), a successive prosecution in which the statutes were assumed to

be the same offense, and *Simpson v. United States,* 435 U.S. 6, 10-13 (1978), a single prosecution in which this Court refused to consider whether the statutes were the same offense, this Court did not reach double jeopardy arguments advanced by the defendants, because it agreed that Congress did not intend for punishment to be imposed under each of the statutes for which the defendants were prosecuted.

2. The multiple punishment for the same offense protection of the Double Jeopardy Clause limits the power of the legislature not to define crimes and fix punishments, but to authorize punishment for both one crime and some other crime that is the same offense.

This case presents the question not presented in Gore and Albernaz and avoided in Whalen, Jeffers and Simpson — whether the multiple punishment for the same offense protection of the Double Jeopardy Clause prohibits in a single prosecution the imposition of punishment, which the legislature intended, under two statutes, violated in one transaction, that are the same offense as defined by the Blockburger test. In short, whether the multiple punishment provision of Missouri's armed criminal action statute, §559.225, RSMo Supp. 1976, is constitutional. Whereas it is true that this Court has never invalidated a conviction in a single prosecution upon the basis of the Double Jeopardy Clause, it is also true that this Court has never validated two convictions under two statutes that are the same offense. As will be seen, this Court has specifically rejected an opportunity to do so.

The Missouri Supreme Court in *Sours v. State (Sours I),* 593 S.W.2d 208, 213-214, 216-217, 219-220 (Mo. banc

1980), applying the Blockburger test, construed Missouri's armed criminal action statute, §559.225, RSMo Supp. 1976, and first degree robbery statute, §560.120, RSM0 1969, and §560.135, RSMo Supp. 1975, to be the same offense. The elements of armed criminal action are: 1.) any felony and 2.) the use of a dangerous and deadly weapon in the commission of any felony. The elements of first degree robbery are: 1.) taking the property of another and 2.) by violence to his person or by putting him in fear of some immediate injury to his person. Armed criminal action contains an element not in first degree robbery, the use of a dangerous and deadly weapon; for robbery, any means of the production of fear will suffice. But first degree robbery contains no element not in armed criminal action, because the any felony element of armed criminal action comprises all the elements of first degree robbery. *Sours I, supra,* 593 S.W.2d at 220; *Sours v. State (Sours II),* 603 S.W.2d 592, 597-598 (Mo. banc 1980); *State v. Haggard,* 619 S.W.2d 44, 50-51 (Mo. banc 1981).

The Missouri Supreme Court in Sours II noted that if this Court were construing Missouri's statutes, it would construe them identically to the Missouri court's construction. *Sours II, supra,* 603 S.W.2d at 604. In any event, even if this Court would be inclined to construe Missouri's statutes differently from the Missouri court's construction, this Court cannot, because it is bound by the construction of a state statute by the highest court of the state. *Brown v. Ohio, supra,* 432 U.S. at 167; *Mullaney v. Wilbur, supra,* 421 U.S. at 690-691; *Memorial Hospital v. Maricopa County, supra,* 415 U.S. at 255-256.

The Missouri Supreme Court in Sours II, applying the Blockburger test, construed Missouri's armed criminal action statute as authorizing punishment for both armed criminal

action and the underlying felony. *Sours II, supra,* 603 S.W.2d at 598. The Missouri Supreme Court noted that "[t]his construction of our state statute is binding on the United State Supreme Court." *Sours II, supra,* 603 S.W.2d at 600-601. The language used in Missouri's armed criminal action statute that leads to the conclusion that the Missouri legislature intended that punishment be imposed for both armed criminal action and the underlying felony is "any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon *is also guilty* of the crime of armed crimnal action and, upon conviction, shall be punished . . . *in addition to* any punishment provided by law for the [underlying] crime . . . ." §559.225.1, RSMo Supp. 1976 (emphasis added); *Sours II, supra,* 603 S.W.2d at 598-599; *Sours I, supra,* 593 S.W.2d at 216; *Haggard, supra,* 619 S.W.2d at 51.

As the Missouri Supreme Court indicated, *Sours I, supra,* 593 S.W.2d at 214-216, this Court's opinions in *Simpson, supra,* and *Jeffers, supra,* foresaw multiple punishment for the same offense problems if a legislature were to authorize punishment under two statutes that are the same offense. In Simpson, the defendants were charged in a single prosecution with two counts each of bank robbery and using a firearm to commit a felony. These bank robberies arose out of two transactions less than two months apart from one another. *Simpson, supra,* 435 U.S. at 7-9. The federal statutes (18 U.S.C. § §2113 (a) and (d) and 18 U.S.C. §924 (c)) are the federal analogues of Missouri's first degree robbery and armed criminal action statutes. Indeed, the federal use of a firearm statute contains language — "[whoever] uses a firearm to commit any felony . . . shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment . . ." (18

U.S.C. 924 (c)) — remarkably similar to language in Missouri's armed criminal statute. The defendants argued, in spite of this language, that Congress did not intend for punishment to be imposed under each of these statutes. The government argued that the two statutes created separate offenses under Blockburger, thus making punishment under each constitutionally permissible. This Court, wishing to avoid a constitutional ruling by declaring that the determination of legislative intent "is the beginning and not the end of the analysis," *Simpson, supra,* 435 U.S. at 10, agreed with the defendants' argument.

> The Blockburger test has its primary relevance in the double jeopardy context, where it is a guide for determining when two separately defined crimes constitute the "same offense" for double jeopardy purposes. *Brown v. Ohio, supra.*
>
> Cases in which the Government is able to prove violations of two separate criminal statutes with precisely the same factual showing, as here, raise the prospect of double jeopardy and the possible need to evaluate the statutes in light of the Blockburger test. That test, the Government argues, is satisfied in this case. We need not reach the issue. Before an examination is made to determine whether cumulative punishments for the two offenses are constitutionally permissible, it is necessary, following our practice of avoiding constitutional decisions where possible, to determine whether Congress intended to subject the defendant to multiple penalties for the single criminal transaction in which he engaged.

Simpson, supra, 435 U.S. at 11-12 (footnotes omitted).

In Jeffers, the defendant was charged, in separate indictments, with conspiracy to distribute narcotics and conducting a criminal enterprise to violate the drug laws. The defendant opposed the government's motion to consolidate the charges for trial. The government's motion was denied.

The defendant, during his trial for conspiracy, of which he was eventually convicted, moved to dismiss the continuing criminal enterprise charge on the ground that, since the two offenses were inclusive and included offenses and the same under Blockburger, he was being placed in double jeopardy. This motion was overruled, and the defendant was eventually convicted for conducting a criminal enterprise. *Jeffers, supra,* 432 U.S. at 140-145. The Court of Appeals held that conspiracy to distribute narcotics was a lesser-included offense of continuing criminal enterprise, *United States v. Jeffers,* 532 F.2d 1101,1106 (CA7 1976), but that these two statutes, nevertheless, were not the same offense for double jeopardy purposes, *United States v. Jeffers, supra,* 532 F.2d at 1111, because this Court in *Iannelli, supra,* "seems to have formed a new double jeopardy approach . . . the theme of [which] seems to be that at least in the area of complex statutory crimes, if Congress intends that two offenses be retained as independent offenses, prosecution under both is permissible." *United States v. Jeffers, supra,* 532 F.2d at 1108.

Thus presented with an opportunity to rule as Missouri urges it to do herein, this Court, assuming but not deciding that conspiracy to distribute narcotics was an included offense of continuing criminal enterprise, *Jeffers, supra,* 432 U.S. 149-150, held first that "Iannelli created no exception to . . . general jeopardy principles for complex statutory crimes," *Jeffers, supra,* 432 U.S. at 151 (footnote omitted), and secondly, again avoiding a constitutional ruling by beginning the analysis with determining legislative intent, that Congress did not intend punishment under each statute.

> The critical inquiry is whether Congress intended to punish each statutory violation separately. . . . In Iannelli v. United States, the Court concluded that Congress did intend to punish violations . . . separately . . . Since the

> two offenses were different, there was no need to go further. . . . If some possibility exists that the two statutory offenses are the "same offense" for double jeopardy purposes, however, it is necessary to examine the problem closely, in order to avoid constitutional multiple punishment difficulties.

Jeffers, supra, 432 U.S. at 155.

As the Missouri Supreme Court indicated, *Sours I, supra,* 593 S.W.2d at 215, 216, this Court's mighty effort to avoid in Simpson and Jeffers the precise constitutional issue unavoidably presented to it herein implies that when a legislature intends for punishment to be imposed under two statutes that are the same offense, a multiple punishment for the same offense violation occurs. And by extension, this Court's mighty effort to avoid the precise constitutional issue unavoidably presented herein by twice remanding it for reconsideration, *Missouri v. Sours,* 446 U.S. 962 (1980), *Missouri v. Counselman,* 450 U.S. 990 (1981), implies that when a legislature intends for punishment to be imposed under two statutes that are the same offense, a double jeopardy violation occurs. Missouri's claim that this Court's vacations of judgment and remands for reconsideration in light of the intervening Whalen and Albernaz decisions required the Missouri Supreme Court to hold for the state is absurd. A vacation of judgment and remand for reconsideration is not a reversal on the merits. A remand for reconsideration provides the lower court an opportunity to more precisely define the issue under review, as the Missouri Supreme Court has done in Sours II and Haggard. Furthermore, even *Gore, supra,* and *Albernaz, supra,* imply that when the converse of the precise issue in those cases arises, *i.e.* when a legislature intends for punishment to be imposed under two statutes that are the same offense rather than separate offenses, a double jeopardy violation occurs.

The Missouri Supreme Court found the multiple punishment provision of Missouri's armed criminal action statute to be unconstitutional, because it believed that the multiple punishment for the same offense protection prohibits the legislature from authorizing punishment to be imposed under two statutes that are the same offense.

> It is not the creation of a new crime [or, it may be added, the fixing of punishment for it] that offends the double jeopardy guarantee; it is the provision that a defendant be convicted and punished for both the new crime and the underlying, included felony that offends.

Sours I, supra, 593 S.W.2d at 221 n. 10.

> If the vacation of our prior judgment and the remand of the case for reconsideration in light of *Whalen* was intended to lead this Court to adopt the view that the General Assembly is free to impose separate punishments for two crimes that constitute the same offense under the traditional same evidence test, we are unable to so read *Whalen* and we are not prepared to take that step. We believe that the United States Supreme Court has heretofore reserved that question as noted above.

Sours II, supra, 603 S.W.2d at 606.

> Until such time as the Supreme Court of the United States declares clearly and unequivocally that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution does not apply to the legislative branch of government, we cannot do other than what we perceive to be our duty to refuse to enforce multiple punishments for the same offense arising out of a single transaction.

Haggard, supra, 619 S.W.2d at 51. Even the assertion "the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors," *Brown v. Ohio, supra,* 432 U.S. at 165, implies that it at least secondarily restrains legislatures.

The concept that the multiple punishment for the same offense protection prohibits the legislature from authorizing punishment to be imposed under two statutes that are the same offense is *not* a concept that limits the legislature's power "to define crimes and fix punishments." *Brown, supra,* 432 U.S. at 165. The Missouri Supreme Court recognized this.

> It is not the creation of a new crime [or, it may be added, the fixing of punishment for it] that offends the double jeopardy guarantee; it is the provision that a defendant be convicted and punished for both the new crime and the underlying, included felony that offends.

Sours I, supra, 593 S.W.2d at 221 n. 10.

> [W]e recognize that the legislature may divide the criminal transaction into its subatomic particles [*i.e.* elements], into protons and neutrons and electrons, into particles of different electrical charges and weights and spins. We hold only that, once the definition of a crime is fixed as a configuration of such elements, the state may not, consistently with the due process clause and the double jeopardy clause, impose separate punishments both for the neutron and for the atom of which it is a part.

Sours II, supra, 603 S.W.2d at 595 n. 3.

Armed criminal action as a crime with its own punishment exists in Missouri. The Missouri Supreme Court has not struck down the entire armed criminal action statute; the court has struck down only the multiple punishment provision of the statute.

> "The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon." Our determination that the description of the offense of

> armed criminal action includes all of the elements of the underlying felony requires that the statute be construed as if this sentence were stricken from each subsection. . . .

Sours I, supra, 593 S.W.2d at 222-223. Indeed, the Missouri Court of Appeals has affirmed convictions for armed criminal action alone. *State v. Davis,* 624 S.W.2d 72, 74-76 (Mo. App. 1981) (convictions affirmed for rape, two counts of sodomy and armed criminal action based upon kidnapping, when the kidnapping conviction was dismissed by the state prior to sentencing); *State v. Helm,* 624 S.W.2d 513, 517-518 (Mo. App. 1981) (convictions affirmed for first degree assault by means of a dangerous instrument and armed criminal action based upon first degree robbery, when the charge of first degree robbery was withdrawn); *State v. Russell,* 629 S.W.2d 555, 556-557 (Mo. App. 1982) (convictions affirmed for first degree burglary and armed criminal action based upon rape, when the State elected not to submit the charge of rape).

When punishment has been imposed for both armed criminal action and the underlying felony, the Missouri Supreme Court has elected the remedy of reversing the armed criminal action conviction rather than reversing the underlying felony conviction. *Sours I, supra,* 593 S.W.2d at 223; *Sours II, supra,* 603 S.W.2d at 606; *Haggard, supra,* 619 S.W.2d at 51. While realizing that it could elect either the remedy of reversing the underlying felony conviction or remanding the case for a new trial so that the jury could choose for which offense it would convict and assess punishment, the Missouri Supreme Court elected the remedy of reversing the armed criminal action conviction. In Missouri, the jury generally has the power to assess punishment in the first instance. §557.036.2, RSMo Supp. 1981. The court

interpreted juries assessment of the greater punishment upon the underlying felony conviction rather than upon the armed criminal action conviction "in excess of ninety-five percent of the cases" to mean that juries believed they were enhancing the greater sentence for the underlying felony for using a weapon to commit. *State v. Kane,* 629 S.W.2d 372, 373, 377 (Mo. banc 1982).

3. The multiple punishment for the same offense protection prohibits not the imposition of punishment that is excessive, but the distribution of an amount of punishment, regardless of whether the amount may be excessive, through more than one statute when the statutes are only different descriptions of the same offense.

The Double Jeopardy Clause "is rooted in history and is not an evolving concept like that of due process . . . ." *Gore, supra,* 357 U.S. at 392. Double jeopardy is, then, also unlike the Eighth Amendment prohibition against cruel and unusual punishment, which "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles,* 356 U.S. 86, 101 (1958); *Weems v. United States,* 217 U.S. 349, 373-375 (1910). Double jeopardy is further unlike the prohibition against cruel and unusual punishment in that while the Eighth Amendment is concerned with the amount and nature of punishment, the Fifth Amendment is concerned with the statutes through which an amount of punishment is distributed. The cruel and unusual punishment protection of the Eighth Amendment prohibits an amount of punishment that is excessive. The multiple punishment for the same offense protection of the Double Jeopardy Clause prohibits the

distribution of an amount of punishment, regardless of whether the amount may be excessive, through more than one statute when the statutes are only different descriptions of the same offense.

Because it confuses this distinction between the amount of punishment and the statutes through which an amount of punishment is distributed, Missouri concludes that there is "no rational basis" for the Blockburger test being a rule of Constitutional magnitude to determine whether two statutes are the same offense, rather than a rule of statutory construction to determine whether the legislature intended for punishment to be imposed under two statutes, "since the same result can be reached, and the [Blockburger] rule circumvented, by careful legislative draftmanship." Brief for Petitioner, 39. In short, since a statute could have been drafted constitutionally, not only does the constitutional defect in the statute disappear, but also the constitutional protection itself.

Missouri posits a hypothetical statute that it claims both eliminates the multiple punishment for the same offense objection to the armed criminal action statute, by removing from the statute the language "is also guilty of armed criminal action," and reveals the chimerical nature of the multiple punishment for the same offense protection, by retaining in the statute additional punishment for committing a felony through the use of a weapon. Brief for Petitioner, 41-42. Missouri's hypothetical statute is equivalent to the hypothetical statute whoever is convicted of crime X shall be punished by ten years imprisonment and by an additional five years imprisonment. Brief for the United States, 18-19. A similar statute, providing for additional punishment for the use of a weapon while committing a felony, existed in Missouri for forty-nine years until the armed criminal action

statute was enacted. *Kane, supra,* 629 S.W.2d at 374. The hypothetical statute is a roundabout way of saying whoever is guilty of crime X shall be punished by fifteen years imprisonment, and it does remove the multiple punishment for the same offense objection, because the amount of punishment is not distributed through more than one statute. But the positing of a hypothetical statute that demonstrates how the Missouri General Assembly could have constitutionally provided for additional punishment for committing a felony through the use of a weapon does not mean that the constitutional defect in the real armed criminal action statute disappears or that the multiple punishment for the same offense protection is nonexistent. Missouri's armed criminal action statute does not become constitutional because it could have been drafted constitutionally.

Missouri claims that if the legislature can criminalize conduct, then "the Fifth Amendment does not preclude the legislature from dividing that conduct into two different offenses [statutes] punishable by separate sentences. . . ." Brief for Petitioner, 45. That is exactly what the Fifth Amendment precludes, if the statutes are only different descriptions of the same offense, because the Fifth, unlike the Eighth, Amendment is concerned with the statutes through which an amount of punishment is distributed. For example, take the hypothetical statute whoever commits crime X shall be punished by ten years imprisonment and an additional five years imprisonment for committing crime Y, crime X being a lesser included offense of crime Y, Brief for the United States, 19, which is similar to a combination of Missouri's first degree robbery and armed criminal action statutes. The statute is a roundabout way of saying whoever is guilty of crime Y shall be punished by fifteen years imprisonment, but it, nevertheless, violates the multiple

punishment for the same offense protection, because it distributes an amount of punishment, fifteen years, through two statutes, X and Y, that are the same offense. Also, the statute does not become constitutional because it could have been drafted constitutionally.

Because it fails to recognize this distinction between the concerns of the Fifth and the Eighth Amendments, Missouri claims that Fifth Amendment analysis is only a " 'literary critique' " of legislative draftsmanship, Brief for Petitioner, 45, or an "arbitrary linguistic standard," Brief for United States, 18. Fifth Amendment analysis is this Court fulfilling its obligation to determine the meaning of the Constitution and in particular the meaning of the phrase the same offense in the Fifth Amendment.

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
>
> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Marbury v. Madison, 1 Cranch (5 U.S.) 137, 177-178 (1803); *United States v. Will,* 449 U.S. 200, 219 (1980). It is a "basic principle" and a "permanent and indispensible feature of our constitutional system" that the "federal judiciary is supreme in the exposition of the law of the Constitution . . . ." *Cooper v. Aaron,* 358 U.S. 1, 18 (1958). Compare this Court's understanding of what branch of

government determines the meaning of the Constitution to Missouri's understanding of what branch does — "What is or is not 'the same offense' is, *of course,* a uniquely legislative determination." Brief for Petitioner, 31 (emphasis added).

4. *Brown v. Ohio,* 432 U.S. 161 (1977) is not authority for the proposition that in the single prosecution context double jeopardy is limited only to assuring that courts do not impose more punishment than the legislature has authorized or that in the successive prosecution context double jeopardy serves a constitutional policy of finality in an aspect other than that of protecting the defendant's interest in avoiding double punishment.

On the one hand, Missouri claims that in the single prosecution context the Blockburger test is solely a rule of statutory construction, not controlling when there is a clear indication of contrary legislative intent, which is to say an intent to punish under each of two statutes that otherwise would be the same offense. On the other hand, Missouri claims that in the successive prosecution context the Blockburger test is a rule of Constitutional magnitude, controlling in spite of a clear legislative intent to punish under each of two statutes that are the same offense. Brief for Petitioner, 32-34. The Double Jeopardy Clause in the single prosecution context "is limited to assuring that the defendant does not receive more punishment than the legislature intended to be imposed," Brief for Petitioner, 28. In the successive prosecution context, however, double jeopardy expands to protect the defendant from receiving all the punishment the legislature intended to be imposed. In other words, the state may do in one prosecution what it may not

do in two — punish under two statutes that are the same offense.

Missouri claims that in the single prosecution context the Double Jeopardy Clause "is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Brown v. Ohio,* 432 U.S. 161, 165 (1977). As said before, the defendant in Brown was convicted under Ohio law in one venue for stealing an automobile on day one and then in another venue for joyriding in the same automobile on day nine. Since the two statutes were the same offense this Court held that punishment could not be imposed under each, though they were violated on different days. *Brown v. Ohio, supra,* 432 U.S. at 169. Missouri ignores the context in which Brown was decided. This Court realized that the Ohio legislature had not authorized punishment for each day the offense of joyriding continued. "We would have a different case if the Ohio Legislature had provided that joyriding is a separate offense for each day in which a motor vehicle is operated without the owner's consent." *Brown v. Ohio, supra,* 432 U.S. at 169 n. 8. Had the Ohio legislature expressed such an intention and had this Court held that punishment could be imposed under the statute for each day of the offense, then the Double Jeopardy Clause would have been limited, even in the successive prosecution context since Brown was prosecuted successively in separate venues, to assuring that courts do not impose more punishment than the legislature has authorized. Since the Ohio legislature had not expressed an intention to punish under the statute for each day of the offense, Brown does not limit the clause to only assuring that courts do not impose more punishment than the legislature has authorized.

Missouri claims that in the successive prosecution context

the Double Jeopardy Clause "serves 'a constitutional policy of finality for the defendant's benefit' . . . [which] protects the accused from attempts to relitigate the facts underlying a prior acquittal . . . and from attempts to secure additional punishment after a prior conviction and sentence." *Brown v. Ohio, supra,* 432 U.S. at 165. This quotation points out that the constitutional policy of finality in one of its aspects reinforces the multiple punishment for the same offense protection.

> Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded aganst by the Constitution.

Ex parte Lange, 18 Wall. (85 U.S.) 163, 173 (1874).

In one of its other aspects, that of collateral estoppel, the constitutional policy of finality does not estop the state from initiating a second prosecution after a conviction, because no ultimate fact has been determined against the state when the first trial ended in a conviction. "For whatever else that constitutional guarantee [the Fifth Amendment] may embrace, . . . it surely protects a man who has been *acquitted* from having to 'run the gauntlet' a second time." *Ashe v. Swenson,* 397 U.S. 436, 445-446 (1970) (emphasis added). Thus while it is true that the constitutional policy of finality protects against the state repeatedly attempting to convict the defendant and thus enhancing the likelihood of finding him guilty though he be innocent, the collateral estoppel aspect of the policy does not protect the defendant from successive prosecution after conviction.

The claim that this Court was protecting in Brown v. Ohio some aspect of the constitutional policy of finality other than

avoiding multiple punishment is contrary to this Court's express declarations of the interests it was and was not protecting. This Court was protecting the defendant's interest in avoiding multiple punishment, which came about in Brown through a successive prosecution.

> If two offenses are the same under this [Blockburger] test for purposes of barring successive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecution. . . . Where the judge is forbidden to impose cumulative punishment for two crimes at the end of a single proceeding, the prosecution is forbidden to strive for the same result in successive proceedings.

Brown v. Ohio, supra, 432 U.S. at 166. This Court was not protecting the defendant's interest in avoiding the repetition of proof.

> Because we conclude today that a lesser included and a greater offense are the same under Blockburger, we need not decide whether the repetition of proof required by successive prosecutions against Brown would otherwise entitle him to the additional protection offered by Ashe [*Ashe v. Swenson,* 397 U.S. 436 (1970)] and Nielson [*In re Nielson,* 131 U.S. 176 (1889)].

Brown v. Ohio, supra, 432 U.S. at 166 n. 6.

5. Missouri's claim — that the Blockburger test is solely a rule of statutory construction — not only leads to the abolition of the protection against multiple punishment for the same offense, but also to the abolition of the protection against reprosecution after conviction.

Perhaps the defendant's interest Missouri claims is being protected by the constitutional policy of finality in the reprosecution after conviction context is his interest in

avoiding the repetition of proof or in terminating the proceedings before a particular tribunal. Thus punishment may be imposed under two statutes that are the same offense in a single prosecution, not because the statutes are not the same offense, but because the state has charged all possible statutory violations in a single indictment and adduced all possible evidence at a single trial. And thus punishment may not be imposed under two statutes that are the same offense in a successive prosecution after conviction, not because the statutes are the same offense, but because the actual evidence adduced by the state in the second prosecution was or could have been adduced in the first.

This Court has never declared that the defendant's interest in avoiding the repetition of proof is protected in the reprosecution after conviction context by the Double Jeopardy Clause. First, the double jeopardy clause is not a compulsory rule of joinder, requiring the state to join in one indictment all the statutes violated by an accused in a single criminal transaction. Secondly, the test for determining when two statutes are the same offense is a required, not an actual, evidence test. An actual evidence test would let more of the guilty go free, even in a single prosecution, than a required evidence test. While each of two statutes may require proof of different elements, the actual evidence adduced to prove those elements may be the same. For example, the defendants in Albernaz could not have been convicted under an actual evidence test, even in a single prosecution, of both conspiracy to import marijuana and conspiracy to distribute marijuana, because the different elements (importation and distribution) were proved by the same evidence (the single agreement). Thirdly, *In re Nielson,* 131 U.S. 176 (1889) does not stand for a definition of the phrase same offense broader than that of Blockburger. The two federal statutes in

Nielson, adultery and unlawful cohabitation, were the same offense, because, though adultery required proof of having sexual intercourse with one woman while married to another and unlawful cohabitation required proof of living with more than one woman at the same time, this Court construed living with more than one woman at the same time to include sexual intercourse. "Living together as man and wife is what we decided was meant by unlawful cohabitation under the statute. Of course, that includes sexual intercourse. And this was the integral part of the adultery charged in the second indictment. . . ." *Nielson, supra,* 131 U.S. at 187. Thus though marriage, in addition to sexual intercourse, was required to be proved in adultery, there was no element in unlawful cohabitation not required to be proved in adultery. *Nielson, supra,* 131 U.S. at 189.

This Court's decisions reveal that the defendant's interest in terminating the proceedings before a particular tribunal is, while it does exist in the reprosecution after conviction context, the weakest of his interests promoted by the Double Jeopardy Clause and almost always can be outweighed by the state's counterbalancing interest in punishing the guilty. If a judge grants a defendant's motion to terminate the proceedings before the case is submitted to the jury, the government may appeal if the dismissal is unrelated to the factual question of the defendant's guilt or innocence. *United States v. Scott, supra,* 437 U.S. 82. The government may appeal if a judge acquits the defendant after a jury has found him guilty. *United States v. Wilson,* 420 U.S. 332 (1975). If a judge grants a motion for mistrial, the government may seek a new indictment unless the prosecutor intended to provoke the motion. *Oregon v. Kennedy,* ____ U.S. ____ No. 80-1991 (May 24, 1982). The government may seek a new indictment for the offense if a judge

declares a mistrial before acquittal or conviction on the basis of manifest necessity or because the ends of public justice would otherwise be defeated. *United States v. Perez,* 9 Wheat. (22 U.S.) 579 (1824). When a defendant successfully appeals his conviction, the government may retry him for the same offense if the reversal is due to trial error. *United States V. Ball,* 163 U.S. 662 (1896).

Thus Missouri's claim that in the single prosecution context the Blockburger test is solely a rule of statutory construction, but that in the reprosecution after conviction context it is a rule of Constitutional magnitude, simply cannot be true. The defendant's interest in avoiding the repetition of proof is not protected in the reprosecution after conviction context by the Double Jeopardy Clause. Double jeopardy is not a compulsory rule of joinder, this Court does not use an actual evidence test to determine whether two statutes are the same offense, and Nielson does not stand for a definition of the phrase same offense broader than that of Blockburger. The defendant's interest in terminating the proceedings before a particular tribunal would be outweighed by the state's counterbalancing interest in punishing the guilty. In any event, these competing interests would never be balanced if the legislature were to authorize the successive prosecution of statutes that are the same offense. Thus Missouri's "justification" for its claim that "the meaning of the phrase 'same offense' in the multiple punishment context is in fact different from the meaning of the phrase 'same offense' in the multiple prosecution context," *Sours II, supra,* 603 S.W.2d at 497 n. 4, is, upon close examination, based upon inaccuracies.

Once it is realized that Missouri's justification for its claim rests upon a misunderstanding of the protection the Double Jeopardy Clause provides in the reprosecution after con-

viction context, then it is apparent that Missouri's claim that the Blockburger test is solely a rule of statutory construction cannot be limited to the single prosecution context. As the Missouri Supreme Court realized, Missouri's claim not only leads to the destruction of the multiple punishment for the same offense protection.

> We believe that such a ruling would abolish the traditional double jeopardy protection against multiple punishments for the same offense. It would require bifurcation of the meaning of "same offense" under the double jeopardy clause. It would grant to the state legislature the power to define the meaning of "same offense" as used in the double jeopardy clause of the Constitution, a traditional judicial function. The implicit effect of such a holding would be that the double jeopardy clause would hereafter be only a limitation on the executive and judicial branches, but not on the legislative banch of government.

Sours II, supra, 603 S.W.2d at 606. The multiple punishment for the same offense protection would be abolished, because this Court would have abandoned its duty to determine the meaning of the Constitutional phrase the same offense to the Missouri General Assembly, which could bifurcate its meaning in the sense that, by merely expressing its intent to punish under each of the two statutes, two statutes that are the same offense in a successive prosecution are not the same offense in a single prosecution. Missouri's claim also eventually leads to the destruction of the reprosecution after conviction for the same offense protection.

> If a state legislature could manipulate the meaning of the phrase "same offense" as it is used in the fifth amendment to the Constitution, there would be no reason to suppose that the Constitution prevents a

> legislature from authorizing, by a clear expression of intent, the sequential prosecution and punishment of the greater and lesser included offense.

Sours II, supra, 603 S.W.2d at 596 n. 4. Once the Double Jeopardy Clause protects against only what the legislature has authorized, the legislature is free to authorize anything.

6. *Albernaz v. United States,* 450 U.S. 333 (1981), *Whalen v. United States,* 445 U.S. 684 (1980), *Brintley v. Michigan,* 444 U.S. 948 (1979) and *Whack v. Maryland,* 450 U.S. 990 (1981) are not controlling precedents for the decision below.

Missouri claims that *Albernaz v. United States,* 450 U.S. 333 (1981) was binding upon the Missouri Supreme Court in *State v. Haggard,* 619 S.W.2d 44 (Mo. banc 1981), relied upon by the court below in *State v. Hunter,* 622 S.W.2d 374 (Mo. App. 1981). Missouri claims that the ultimate and penultimate sentences in Albernaz should have controlled the decision in Haggard.

Albernaz is not a controlling precedent for Haggard, the ultimate and penultimate sentences in Albernaz are dicta, and they must be understood in the context in which they were written. As said before, in Albernaz, conspiracy to import marijuana and conspiracy to distribute marijuana each require proof of a different element, and thus are separate offenses. *Albernaz, supra* 450 U.S. at 344 n. 3. In this context, the dicta, "the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed," *Albernaz, supra,* 450 U.S. at 344, is correct. In Haggard, armed criminal action and first degree robbery each do not require proof of a different element, and thus are the same offense. *Haggard, supra,* 619 S.W.2d at 50.

In other words, the issues in Albernaz and Haggard are different. In Albernaz, the issue was does the multiple punishment for the same offense protection prohibit in a single prosecution the imposition of punishment, which the legislature intended, under two statutes that are separate offenses — two statutes each of which require proof of a different element. In Haggard, the issue was the same, but for there being the same offense — two statutes each of which do *not* require proof of a different element. The Missouri Supreme Court noted this difference.

> Our reading of Albernaz persuades us that the United States Supreme Court was dealing with two separate crimes each involving proof of an element different from and not included in the other. Our case and its predecessors, Sours I and Sours II, are distinguishable from Albernaz for the reason that having proved every fact and element necessary to prove robbery with a dangerous and deadly weapon, you have proved every element and every fact required for proof of armed criminal action. We are in complete agreement with the Hunter [*Hunter v. State,* 430 A.2d 476, 480 (Del. 1981)] court that "The definitive ultimate and penultimate sentences of Albernaz are *dicta,* unnecessary to reach the Court's conclusion in that case; . . . ."

Haggard, supra, 619 S.W.2d at 50.

The Delaware court chose to follow the Albernaz dicta. *Hunter v. State,* 430 A.2d 476, 481 (Del. 1981). The Missouri court did not, and was not required to. Broad language, unnecessary to a decision of this Court, cannot be considered binding authority. *Kastigar v. United States,* 406 U.S. 441, 454-455 (1972).

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected,

> but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. Virginia, 6 Wheat. (19 U.S.) 264, 399 (1821); *Zenith Radio Corp. v. United States,* 437 U.S. 443, 462 (1978). Since the question presented herein "was not explicitly raised" in Albernaz, this Court will not treat the question as "foreclosed." *Adams v. Texas,* 448 U.S. 38, 45 n. 3 (1980). Nor does this Court's denial of certiorari to the Delaware court, *Hunter v. Delaware,* ____ U.S. ____, No. 81-5228 (November 2, 1981), make the Albernaz dicta binding authority or foreclose this Court from considering the question upon which it was expressed. A denial of a petition for a writ of certiorari, since it means only that "fewer than four members of the Court thought it should be granted, . . . carries with it no implication whatever regarding the Court's views on the merits of a case." *Maryland v. Baltimore Radio Show, Inc.,* 388 U.S. 912, 919 (1950). It cannot be, as Missouri claims it is, that a Florida court in *State v. Hegstrom,* 401 So.2d 1343, 1345 (Fla. 1981) chose to follow the Albernaz dicta, because that case is identical to Whalen and involved no legislative authorization of punishment for both felony-murder and the underlying felony.

Missouri also claims that the Missouri Supreme Court failed to be bound by Albernaz, because it failed to recognize that the Blockburger test is solely "a rule of statutory construction" which "because it serves as a means of discerning congressional purpose should not be controlling where, for example, there is a clear indication of contrary

legislative intent." *Albernaz, supra,* 450 U.S. at 340. As said before, the Fifth and Fourteenth Amendments require the State of Missouri to use the Blockburger test, a required evidence test in which the elements of two statutes are compared, to determine whether punishment may be imposed under each of two Missouri statutes. The Missouri Supreme Court noted that the Blockburger test is one required to be used by the federal constitution. *Haggard, supra,* 619 S.W.2d at 50-51. Even Albernaz itself noted that the Blockburger test is required by the federal constitution. *Albernaz, supra,* 450 U.S. at 344 n. 3. Missouri's claim — that Albernaz requires that Blockburger should not be controlling when there is a clear indication of legislative intent to punish under two statutes that are the same offense — again ignores the context in which Albernaz was decided. The clear indication of contrary legislative intent to which Albernaz refers is an "intent contrary to the presumption accorded these statutes after application of the Blockburger test." *Albernaz, supra,* 450 U.S. at 340. This presumption is that Congress, because it was silent upon the matter, intended to punish multiply the separate offenses — two statutes each of which require proof of a different element. *Albernaz, supra* 450 U.S. at 340-341. Thus had Congress expressed an intention to punish only singly the two offenses, the Blockburger test, as a rule of statutory construction, would not be controlling.

Missouri claims that *Whalen v. United States,* 445 U.S. 684 (1980) was binding upon the Missouri Supreme Court in *State v. Haggard,* 619 S.W.2d 44 (Mo. banc 1981), relied upon by the court below in *State v. Hunter,* 622 S.W.2d 374 (Mo. App. 1981). Whalen is not a controlling precedent for Haggard. As said before, in Whalen, this Court, applying the Blockburger test as a rule of statutory

construction, held that Congress did not authorize punishment for both rape and killing the same victim in the course of rape since each statute did not require proof of a fact that the other did not. *Whalen, supra,* 445 U.S. at 690-691, 693-694. In this context, the statement "[t]he dispositive question, therefore, is whether Congress did . . . provide [for punishment for both rape and killing the same victim in the course of rape], *Whalen, supra,* 445 U.S. at 689, is correct. In Haggard, the Missouri Supreme Court held that the Missouri General Assembly did authorize punishment for both armed criminal action and first degree robbery. The issue that was avoided in Whalen could not be in Haggard.

> When *Sours I* was vacated by the United States Supreme Court and we were directed to reexamine the case in light of *Whalen,* we concluded that the unique wording of the Missouri statutes and clear, positive and unequivocal intent of the legislature to authorize multiple punishments did not leave us the same option which the Court had in Whalen — that of finding that Congress intended not to twice punish thereby permitting the Court to reserve the constitutional question of double jeopardy. We concluded that we had no alternative other than to meet the double jeopardy issue.

Haggard, supra, 619 S.W.2d at 51.

In other words, the issues in Whalen and Haggard are different. In Whalen, the issues was does the multiple punishment for the same offense protection prohibit in a single prosecution the imposition of punishment, which the legislature *did not* intend, under two statutes that are the same offense. In Haggard, the issue was does the protection prohibit in a single prosecution the imposition of punishment, which the legislature did intend, under two statutes that are the same offense. The Missouri Supreme Court, which expressly considered at the direction of this Court,

Missouri v. Sours, supra, 446 U.S. 962, the effect of Whalen upon the question presented herein, noted this difference.

> The United States Supreme Court has never decided whether imposing separate punishments in a single proceeding both for the offense of committing a felony by means of a dangerous and deadly weapon and for the commission of the felony violates the double jeopardy clause of the federal Constitution . . . . Each time a similar double jeopardy question has been before the United States Supreme Court, it has found it unnecessary to address the constitutional question, because it has been able to find that the legislature did not intend to separately punish the two offenses involved.

Sours II, supra, 603 S.W.2d at 593.

> The Court [in Whalen] expressly reserved the question, had Congress clearly intended to impose multiple punishments for the same offense, the imposition of such punishment would violate the double jeopardy clause. Before holding that the Court would decide the question of statutory interpretation without deferring to the interpretation of the District of Columbia Court of Appeals, the Court carefully distinguished the question of statutory interpretation from the constitutional question. . . . [S]ince the Court did not reject the petitioner's statutory claim, it did not reach the constitutional issue presented.

Sours II, supra, 603 S.W.2d at 594 (footnote omitted).

> Clearly, the five justices who joined in the opinion of the Court in *Whalen* . . . declined Justice Blackmun's invitation to hold that the question of what punishments are constitutionally permissible can be reduced to the question of what punishment the legislature intended to be imposed. The two questions remain distinct.

Sours II, supra, 603 S.W.2d at 595 (footnote omitted).

Missouri also claims that the Missouri Supreme Court failed to be bound by Whalen, because it failed to recognize that the Blockburger test is a rule of statutory construction and that "where the offenses are the same under [the Blockburger] test, cumulative sentences are not permitted, unless elsewhere specifically authorized by Congress." *Whalen, supra,* 445 U.S. at 693. As said before, the Fifth and Fourteenth Amendments require the State of Missouri to use the Blockburger test, a required evidence test in which the elements of two statutes are compared, to determine whether punishment may be imposed under each of two Missouri statutes. The Missouri Supreme Court noted that the Blockburger test is one required to be used by the federal constitution. *Haggard, supra,* 619 S.W.2d at 50-51. Missouri's claim —that Whalen requires that the Blockburger test should not be controlling unless cumulative sentences are elsewhere specifically authorized by a legislature — again ignores the context in which Whalen was decided. In Whalen, Congress had not specifically authorized cumulative sentences. *Whalen, supra,* 445 U.S. 690-691, 693-694. Thus the issue of whether the Blockburger test would not be controlling had a legislature authorized cumulative sentences was avoided in Whalen.

Missouri claims that this Court's dismissal for want of a substantial federal question of the appeal in *Brintley v. Michigan,* 444 U.S. 948 (1979), which presented a constitutional issue identical to the one presented herein, was binding upon the Missouri Supreme Court in Haggard. This argument is like water over the dam, because the question presented is now before this Court. Summary dispositions do not have the same precedential value in this Court as do opinions of this Court after briefing and oral argument on the merits, and it is not at all unusual for this Court to give full

consideration to a question that has been the subject of previous summary dispositions, and to even discard a rule that a line of summary dispositions may appear to have established. *Washington v. Yakima Indian Nation,* 439 U.S. 463, 476 n. 20 (1979); *Illnois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 180-181 (1979); *Metromedia, Inc. v. City of San Diego,* ____ U.S. ____ No. 80-195 (July 2, 1981). Also, summary dispositions do not necessarily approve of the reasoning of the court below. *Mandel v. Bradley,* 432 U.S. 173, 176 (1977). The question presented that Missouri asks this Court to avoid or resolve on the basis of stare decisis has never received plenary attention in this Court. Furthermore, it is obvious that this Court (because of its remands for reconsideration, rather than reversals, in *Missouri v. Sours, supra,* 446 U.S. 962 and *Missouri v. Counselman, supra,* 450 U.S. 990) considers the question presented herein as unresolved.

To address the merits of Missouri's claim, however, Brintley is not a controlling precedent for Haggard. Summary dispositions are rulings on the merits binding upon lower courts, *Hicks v. Miranda,* 422 U.S. 332, 343-345 (1975), but only in the sense that they "reject the specific challenges presented in the statement of jurisdiction and . . . leave undisturbed the judgment appealed from." *Mandel v. Bradley, supra,* 432 U.S. at 176. "Ascertaining the reach and content of summary actions may itself present issues of real substance. . . ." *Hicks v. Miranda, supra,* 422 U.S. at 345 n. 14. A lower court's "initial task" is to determine what issue was presented in the summarily disposed case and to compare it to the issue presented to the lower court, thus enabling the lower court to determine whether the issues are "sufficiently the same" to make the summarily disposed case a "controlling precedent." *Hicks v. Miranda, supra,*

422 U.S. at 345 n. 14; *Illinois State Board of Elections v. Socialist Workers Party, supra,* 440 U.S. at 181-182.

The issue presented to this Court in Brintley is different from the issue presented to the Missouri Supreme Court in Haggard. The question presented in the statement of jurisdiction in Brintley follows.

> "Does double jeopardy clause prohibit separate convictions and sentences for violation of state statute, §750.227(b), prescribing possession of firearm during commission of felony and for underlying felony (armed robbery in one case and second degree murder in another), when all proofs required to establish violation of underlying felony are necessarily required for proof of violation of §750.227(b) where there is no evidence that weapon has been possessed for any other purpose than commission of underlying felony, where underlying felony is specifically charged as felony element of firearms possession charge, and where (in armed robbery case) state has already augmented punishment for armed robberies above punishment imposed for unarmed robberies."

26 Crim. L. Rptr. 4113. (§750.227(b), M.C.L.A., appears at pages A-17 through A-18 of the petition for certiorari herein). This question presented obviously concerns double jeopardy law as applied to Michigan, not Missouri, statutes. Thus Michigan courts and federal courts after Brintley are not free to conclude that punishment under both Michigan's felony-firearm and underlying felony statutes is prohibited by the multiple punishment for the same offense protection. Missouri courts and federal courts are still free to conclude that punishment under both Missouri's armed criminal action and underlying felony statutes is prohibited by the protection. Also, Missouri's armed criminal action statute, §559.225, RSMo Supp. 1976 (appearing at pages A-15 through A-16 of the petition for certiorari herein) applies to

the commission of any felony by, with, or through the use, assistance or aid of a dangerous or deadly weapon, whereas Michigan's felony-firearm statute, §750.227(b), M.C.L.A., applies to the commission of a felony while carrying or possessing a firearm. Thus a Missouri defendant who only carries or possesses a firearm while committing a felony, as opposed to actually using it to commit the felony, would not be guilty of armed criminal action.

The issue presented to this Court in Brintley differs in an even more fundamental manner from the issue presented to the Missouri Supreme Court in Haggard. In *Wayne County Prosecutor v. Recorder's Court Judge,* 406 Mich. 374, 280 N.W.2d 793 (1979), the case below in Brintley, the Michigan Supreme Court held that under the Blockburger test felony-firearm and armed robbery (and felony-firearm and second degree murder) each require proof of a different element. *Wayne County Prosecutor, supra,* 280 N.W.2d at 789-800. This Court is bound by the construction of a state statute by the highest court of a state. *Brown v. Ohio,supra,* 432 U.S. at 167; *Mullaney v. Wilbur, supra,* 421 U.S. at 690-691; *Memorial Hospital v. Maricopa County, supra,* 255-256. For this Court to have held, even if it were inclined to believe, that the elements of Michigan's felony-firearm and underlying felony statutes were other than what the Michigan Supreme Court said they were would be to violate these precedents. This Court could determine the elements of Michigan's statutes only in the "extreme circumstances," *Mullaney v. Wilbur, supra,* 421 U.S. at 690-691 and 691 n. 11, of "an obvious subterfuge to evade consideration of a Federal issue." *Radio Station WOW, Inc. v. Johnson, supra,* 326 U.S. 120, 129 (1945). Since the Michigan Court construed its two statutes to create separate offenses, this Court in summarily dismissing the appeal in Brintley was

merely applying an established principle — that punishment for each of two statutes creating separate offenses may constitutionally be imposed, *Gore, supra,* 357 U.S. at 392 — to a particular situation. *Mandel v. Bradley, supra,* 432 U.S. at 176. And it cannot be, as Missouri claims it is, that this Court's dismissal of a writ of certiorari to the Arizona Supreme Court in *State v. Cassius,* 110 Ariz. 485, 520 P.2d 1109, 1110-1111 (1974) as having been improvidently granted, *Cassius v. Arizona,* 420 U.S. 514 (1975), permits punishment, when legislatively authorized, under two statutes that are the same offense, because the statutes involved, first degree burglary and committing a felony while free on recognizance, were held by the Arizona court to be separate offenses, each of which require proof of a different element.

Missouri claims that this Court's dismissal for want of jurisdiction or, in the alternative, denial of certiorari in *Whack v. Maryland,* 450 U.S. 990 (1981), which presented a constitutional issue identical to the one presented here, was binding upon the Missouri Supreme Court in Haggard. Whack is not stare decisis for Haggard. A dismissal of an appeal for want of jurisdiction is not a ruling on the merits, but only a determination that this Court lacks the power, under 28 U.S.C. §1257 in the case of appeals from state courts, to review the decision below. A denial of a petition for a writ of certiorari, since it means only that "fewer than four members of the Court thought it should be granted, . . . carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review." *Maryland v. Baltimore Radio Show, Inc., supra,* 338 U.S. at 919.

The issue in *Whack v. State,* 288 Md. 137, 416 A.2d 265 (1980), the case below in Whack, is different from the issue

in Haggard. In the case below in Whack the Maryland Court of Appeals only *assumed,* rather than held, that robbery with a dangerous and deadly weapon and use of a handgun in the commission of a felony each did not require proof of a different element. *Whack v. State, supra,* 416 A.2d at 271. This Court ought not to pass on questions of constitutionality unless such adjudication is unavoidable. *Harris v. McRae,* 448 U.S. 297, 306-307 (1980). Furthermore, the Maryland court noted that *Couplin v. State,* 37 Md. App. 567, 378 A.2d 197, 204-205 (1977), cert. denied, 281 Md. 735 (1978) held that those two offenses each require proof of a different element. *Whack v. State, supra,* 416 A.2d at 271 n. 5. This Court is bound by the construction of a state statute by the highest court of a state. *Brown v. Ohio, supra,* 432 U.S. at 167; *Mullaney v. Wilbur, supra,* 421 U.S. at 690-691; *Memorial Hospital v. Maricopa County, supra,* 415 U.S. at 255-256. Thus the principle of *Gore, supra,* 357 U.S. at 392, that punishment under each of two statutes creating separate offenses may constitutionally be imposed, may be applicable to the Maryland statutes.

7. This Court must undergo the ordeal of judgment and bring, cautiously and with respect for the legislature, the legislative power to the judgment of the superior power of the Constitution.

In conclusion, the Missouri Supreme Court has not arrayed its judgment against that of this Court nor has it, by usurping the power of the legislature to define crimes and fix

punishments, arrayed the judgment of the judiciary concerning the wisdom of punishing additionally those who commit a felony through the use of a weapon against the judgment of the legislature. It rightfully conceded that power of judgment to the Missouri General Assembly, but it also rightfully exercised its obligation to adjudicate constitutional issues. The Missouri Supreme Court fulfilled its obligation to the letter and in the spirit of the two principles set forth by this Court when it underwent a similar "ordeal of judgment." It would be wise for this Court now to keep those two principles in mind. First, the courts are obligated to bring the legislative power to the judgment of the superior power of a constitution.

> In Hobbs v. State, . . . and in other cases, prominence is given to the power of the legislature to define crimes and their punishment. We concede the power in most of its exercises. We disclaim the right to assert a judgment against that of the legislature, of the expediency of the laws, or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such case, not our discretion, but our legal duty, strictly defined and imperative in its direction, is invoked. Then the legislative power is brought to the judgment of a power superior to it for the instant.

Weems, supra, 217 U.S. at 378-379.

> This task requires the exercise of judgment, not the reliance upon personal preferences. Courts must not consider the wisdom of statutes but neither can they sanction as being merely unwise that which the Constitution forbids.
>
> We are oath-bound to defend the Constitution. This obligation requires that congressional enactments be

> judged by the standards of the Constitution. The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights.

Trop v. Dulles, supra, 356 U.S. at 103-104. Secondly, in bringing the legislature to the judgment of the constitution, the courts must take care to exercise this judgment cautiously and with respect for the legislature.

> However, there is a certain subordination of the judiciary to the legislature. The function of the legislature is primary, its exercise fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of its wisdom or propriety. They have no limitation, we repeat, but constitutional ones, and what those are the judiciary must judge. We have expressed these elementary truths to avoid the misapprehension that we do not recognize to the fullest the wide range of power that the legislature possesses to adapt its penal laws to conditions as they may exist, and punish the crimes of men, according to their forms and frequency. We do not intend in this opinion to express anything that contravenes those propositions.

Weems, supra, 217 U.S. at 379.

> We cannot push back the limits of the Constitution merely to accommodate challenged legislation. We must apply those limits as the Constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication. We do well to approach this task cautiously, as all our predecessors have counseled. But the ordeal of judgment cannot be shirked.

Trop v. Dulles, supra, 356 U.S. at 104.

CONCLUSION

For the foregoing reason, the judgment of the Missouri Court of Appeals, Western District, should be affirmed.

Respectfully submitted,

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NO. 81-1214

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

THE STATE OF MISSOURI
Petitioner
V
HUNTER
Respondent

BRIEF OF AMICUS CURIAE WAYNE COUNTY PROSECUTOR' OFFICE IN SUPPORT OF PETITIONER

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No. 81-1214

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

THE STATE OF MISSOURI
Petitioner

V

HUNTER
Respondent

BRIEF OF AMICUS CURIAE WAYNE COUNTY PROSECUTOR'S OFFICE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Wayne County Prosecutor is the chief law enforcement officer in the county, prosecuting all offenses in the county.

MCL 750.227b provides a mandatory consecutive two year penalty for a person who possesses a fiearm during the commission of a felony. MCL 750.227b is not simply a sentence enhancement statute; violation of the statute is

a crime in and apart from the predicate felony. **People v Brintley,** 406 Mich 374 (1979); appeal dismissed sub nom **Brintley v Michigan** 444 US 948 (1979). The Wayne County Prosecutor represented the People of the State of Michigan before the Michigan Courts and this court in **Brintley,** and, given that the Missouri statute here at issue and MCl 750.227b are legally indistinguishable in terms of the application of jeopardy principles, has a substantial interest in this Court's resolution of the constitutionality under jeopardy principles of the Missouri statute.

SUMMARY OF ARGUMENT

It is the position of amicus that whether or not a person may be multiply convicted and given cumulative punishment for acts which violate more than one penal statute is **solely** a question of legislative intent. Where the intent to allow or even mandate multiple convictions and cumulative punishment is clearly expressed in the statute there is no further analysis. Neither the test contained in **Blockburger v United States,** 284 US 299 (1932) (which is designed as a rule of statutory construction for the determination of legislative intent where intent is unclear) nor any other test need be met in such a circumstance, for the answer to the question of legislative intent is the end, and not the beginning of the constitutional inquiry. **Albernaz v United States,** US , 67 L Ed 2d 275 (1981). There being no question but that the Missouri legislature intended multiple punishment, the decision of the Missouri Supreme Court invalidating the statute on federal double jeopardy grounds is plainly mistaken and should be reversed by this Court.

ARGUMENT

THE INTENT OF THE LEGISLATURE CONTROLS THE QUESTION OF WHETHER A PERSON MAY CONSTITUTIONALLY BE MULTIPLY CONVICTED AND CUMULATIVELY PUNISHED WHERE HE DOES ACTS WHICH VIOLATE MORE THAN ONE PENAL STATUTE.

The starting point for the analysis which leads inexorably to the conclusion that the intent of the legislature governs the question of multiple conviction and cumulative punishment is **United States v Wiltberger,** 5 Wheat 76, 95; 5 LEd 37, 42 (1820), where Chief Justice Marshall stated what was accepted law then and is accepted law now: "...the power of punishment is vested in the legislative, not the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment." Since the Fifth Amendment to the United States Constitution proscribes twice putting an accused in jeopardy for the same **offense,** and it is the legislature which defines offenses, is the legislature limited in any way by the principles of double jeopardy, so far as cumulative punishment is concerned? Amicus submits not.

Courts have on occasion fallen into the error of using the term "offense" as though is were a synonym for the term "act". They "...have confused substance and procedure...by expanding the scope of the offense to make is co-extensive with the transaction." Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee, 65 Yale L J 339, 348-349 (1956). But it is quite clear that one may receive multiple punishment for the same act so long as his conduct is an

offense against two statutes. **Blockburger v United States**, 284 US 299; 76 LEd 306 (1932); **Gore v United States**, 357 US 386; 78 S Ct 1280; 2 L Ed 2d 1405 (1958); **Brown v Ohio**, 432 US 161; 97 S Ct 2221; 53 L Ed 2d 187 (1977). If the legislature wishes to fragment an act into component parts, each part being an offense and punished separately, it may do so. The Fifth Amendment jeopardy provision in no way limits the legislature's power to define offenses.

This principle is demonstrated by a reading of **Albrecht v United States**, 273 Us l; 47 S Ct 250; 71 Led 505, 511 (1926). There, this Court dealt with a situation involving convictions for both possession and sale of the same illegal liquor. This court **affirmed** both convictions, saying "there is nothing in constitution which prevents congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction." As stated in **Brown v Ohio, supra**, the double jeopardy clause:

> ...serves principally as a restraint on courts and prosecutors. The legislature remains free under the double jeopardy clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial. 53 Led 2d at 193-194.

Where the issue is substantive double jeopardy, that is cumulative punishment arising from one prosecution, rather than procedural double jopardy, that is, the question of successive prosecutions, "...the role of the constitutional guarantee is **limited to assuring that the court does not exceed its legislative authorization** by imposing

multiple punishment for the same offense." **Brown v Ohio, supra,** at 194 (emphasis added).[1] The proposition is also made plain in Comment: Twice in Jeopardy, 75 Yale L J 262 (1965). The Comment flatly states that multiple punishment is not a limitation on the legislature; indeed, that it "would be absurd as a substantive limitation on the legislature." In a section entitled "Legislative Intent Determines the Number of Convictable Offenses" the Comment says:

> When the legislature clearly indicates in a statute its intent with respect to the cumulation of convictions, **the court's task of construction is at an end.** And if legislative intent, though not proclaimed in the statute, is nonetheless perfectly clear from legislative history, the legislature's purpose should be honored. But in the vast majority of cases, unequivocal legislative intent cannot honestly be found in the statute or its official history. Thus the court must ordinarily resort to presumptions about legislative intent— cannons of construction—to determine the unit of convictions created by a statute. (emphasis added).[2]

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[1] **Brown v Ohio,** 53 Led 2d at 195, fn 6, demonstrates that though double jeopardy may prevent a successive prosecution in certain circumstances, it would not necessarily prevent cumulative punishment at one trial under the same circumstances. Note also **Ennis v State,** 23 Cr L Rptr 2521 (Fla Ct App, 8-2-78), where the court held that **Brown v Ohio** and **Harris v Oklahoma,** 432 Us 682; 97 S 2919; 53 Led 2d 1054 (1978) were not inconsistent with conviction and punishment **at one trial** for both felony-murder and robbery, though under Florida law it is necessary to prove the underlying felony to prove felony-murder, the court being of the view that **Brown** and **Harris** do not control cumulative punishment cases. **Whalen v United States,** 445 US 684 (1980) is not contrary, as it simply applied **Blockburger** since legislative intent was not clear.

[2]That the test in **Blockburger** is a "cannon of construction" for use when legislative intent is unclear is made plain in **Iannelli v United States**, 420 Us 770, 784 (fn 17); 95 s CT 1284; 43 l Ed 2d 606 (1975), where **Blockburger** is analogized to Wharton's role as a method of identifying congressional intent.

Amicus submits that the analysis is actually threefold. If multiple punishment was not intended, the inquiry ends. If it was, the inquiry ends. If it is unclear, then "the court must ordinarily result to presumptions about legislative intent—cannons of construction—to determint the unit of conviction created by a statute." Comment: Twice in Jeopardy, **supra.** Kirchheimer, The Act, the Offense and Double Jeopardy, 58 Yale L J 513, 516 (1949) states it thusly:

> In the overwhelming number of cases, however, no clear legislative intent exists. The task of ascertaining whether one or several offense schemes should apply **then** becomes a judicial one which the courts constantly perform behind the veil of procedural tests (Emphasis added).

Even Chief Justice Warren, dissenting in **Gore, supra,** recognized that "In every instance the problem is to ascertain what the legislature intended." The Chief Justice was not speaking merely in avoidance of the analysis if the legislature did not intend multiple punishment; plainly from his opinion he would have also considered the matter closed had he found that the legislature **did** intend to cumulate punishment.

Amicus would summarize his position by quoting from 65 Yale L J 339, 363-364:

> The primary substantive problem is one of legislative intent, not legislative power, for the legislature can award as many different penalties as it deems desirable for a given act or transaction, as long as the statute accords

> substantive due process of law and avoids the eighth ammendment prohibition of cruel and unusual punishments. This authority is inherent in the power to make conduct criminal and to penalize it **and is not limited in any meaningful sense by the concept of double jeopardy** (emphasis added).

This court could not have put the principle more plainly than in the recent decision in **Albernaz v United States,** US ; 67 L Ed 2d 275, 285 (1981):

> Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishment, imposition of such sentences does not violate the constitution.

See also **Brintley v Michigan,** 444 US 948 (1979), which the Missouri Supreme court was obligated to follow. Only three members of the Court disagreed with this language, which is dispositive of the case now before the Court. Those Justices felt that if the **Blockburger** test is not met then multiple conviction and cumulative punishment is impermissible regardless what the legislature intends. Amicus submits that in fact the legislature could create two offenses **identical** in their elements, and provide for multiple conviction and cumulative punishment. The legislature would merely have "...exercised its legitimate penological power in a preposterously roundabout fashion...a judicial veto...(of such a statute)...would operate not as a substantive or penological restriction but as a literary critique of the legislature...; double jeopardy does not limit the legislature's power in this respect. Rather, it limits the court's power to cumulate convictions and punishments when the legislature's will is not explicit." 75 Yale L J at 302.

Amicus concludes that both logic and precedent from this Court compel the reversal of the Missouri Supreme Court.

CONCLUSION

Wherefore, for the reasons set forth above, amicus urges that this court reverse the judgment of the Missouri Supreme Court.

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STATE OF MISSOURI, PETITIONER

v.

DANNY HUNTER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MISSOURI, WESTERN DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars the imposition, in a single proceeding, of legislatively-authorized separate sentences for two offenses arising from a single transaction that are deemed not to satisfy the test announced in *Blockburger* v. *United States*, 284 U.S. 299 (1932).

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MISSOURI, WESTERN DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

INTEREST OF THE UNITED STATES

This case presents an important question concerning the effect of the Double Jeopardy Clause when, pursuant to express legislative authorization, separate sentences are imposed in a single proceeding for convictions under two criminal statutes whose elements may not satisfy the test announced in *Blockburger* v. *United States*, 284 U.S. 299 (1932). Although this is a state case, the question here has a direct impact upon federal prosecutions.

Respondent was convicted and separately sentenced in this case for robbery in the first degree, in viola-

tion of Sections 560.120 and 560.135, Mo. Ann. Stat. App. (Vernon 1979), and for armed criminal action, in violation of Section 559.225, Mo. Ann. Stat. App. (Vernon 1979). The latter statute expressly requires that a defendant convicted of armed criminal action be sentenced to a term of imprisonment "in addition to any punishment provided by law" for the underlying felony. In 18 U.S.C. (Supp. IV) 924(c), Congress similarly has required federal district courts to impose a prison sentence on a defendant convicted of using or carrying a firearm in the commission of a federal felony "in addition to the punishment provided for the commission" of the underlying felony. Because the underlying felonies bear the same relationship to the firearms offenses in both the Missouri and federal statutes, and the legislative intent regarding cumulative punishment appears to be the same, the United States has a significant interest in the resolution of the issue presented for review.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

2. Mo. Ann. Stat. App. § 560.120 (Vernon 1979), provides:

> Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person; or who shall be convicted of feloniously taking the

property of another from the person of his wife, servant, clerk or agent, in charge thereof, and against the will of such wife, servant, clerk or agent by violence to the person of such wife, servant, clerk or agent, or by putting him or her in fear of some immediate injury to his or her person, shall be adjudged guilty of robbery in the first degree.

3. Mo. Ann. Stat. App. § 560.135 (Vernon 1979), provides in pertinent part:

> Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon and every person convicted of robbery in the first degree by any other means shall be punished by imprisonment by the division of corrections for not less than five years * * *.

4. Mo. Ann. Stat. App. § 559.225 (Vernon 1979), provides in pertinent part:

> 1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guility of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

* * * * *

STATEMENT

1. Under Missouri law, any person who commits a felony (with certain exceptions not pertinent here) through the use of a dangerous or deadly weapon is guilty of the crime of armed criminal action and shall be punished by at least three years' imprisonment. Mo. Ann. Stat. App. § 559.225.1 (Vernon 1979). The statute provides that "[t]he punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law * * *" for the underlying felony.

Following a jury trial in the Circuit Court of Jackson County, Missouri, respondent was convicted of robbery in the first degree (Mo. Ann. Stat. App. §§ 560.120 and 560.135 (Vernon 1979)), armed criminal action predicated on the first degree robbery (Mo. Ann. Stat. App. § 559.225 (Vernon 1979)), and assault with malice (Mo. Ann. Stat. App. § 559.180 (Vernon 1979)). Respondent was sentenced to concurrent terms of ten years' imprisonment for the robbery and 15 years' imprisonment for the armed criminal action, and to a consecutive term of five years' imprisonment for the assault (J.A. 10-12).

The facts, which are not in dispute, showed that on November 24, 1978, respondent and two accomplices entered a supermarket and ordered the manager, at gun point, to open two safes (Pet. App. A-1 to A-2). While the manager was complying with the demands of the robbers, respondent struck him twice with the butt of a revolver (*id.* at A-2). An off-duty police officer attempted to stop the robbers as they were leaving the store but respondent fired a shot at the officer and respondent and his accomplices managed to escape (*ibid.*). After his arrest, respondent gave an oral and a written confession to the police

and was positively identified by the store manager and the officer at separate lineups (*id.* at A-2 to A-3).

2. On appeal, the Missouri Court of Appeals affirmed respondent's convictions for robbery and assault but vacated respondent's conviction for armed criminal action and set aside his sentence on that count (Pet. App. A-1 to A-12). As a result of the lower court's action, instead of serving a total of 20 years' imprisonment (15 years for armed criminal action and five years for assault), respondent's sentence has been reduced to a total of 15 years' imprisonment (ten years for robbery and five years for assault). In vacating the conviction and sentence for armed criminal action, the court of appeals relied (Pet. App. A-3) on the decision of the Supreme Court of Missouri in *State* v. *Haggard*, 619 S.W.2d 44 (1981), petition for cert. pending, No. 81-625 (filed Sept. 24, 1981), which reaffirmed the earlier decisions of the Missouri Supreme Court in *Sours* v. *State*, 593 S.W.2d 208, vacated *sub nom. Missouri* v. *Sours*, 446 U.S. 962 (1980) (*Sours I*), and *Sours* v. *State*, 603 S.W.2d 592 (1980), cert. denied, 449 U.S. 1131 (1981) (*Sours II*).

In *Sours I*, the defendant was convicted and separately sentenced for robbery in the first degree and armed criminal action based on the robbery. The Missouri Supreme Court concluded that under the test announced in *Blockburger* v. *United States*, 284 U.S. 299 (1932), armed criminal action and any underlying offense are the "same offense" for double jeopardy purposes because in order to convict for the underlying offense it is not necessary to prove any fact that does not also have to be established to convict for armed criminal action. Although the court acknowledged that the Missouri legislature clearly intended that a defendant would be subject to convic-

tion and sentence under the armed criminal action statute in addition to any conviction and sentence for the underlying felony (593 S.W.2d at 216), the court inferred from the decisions in *Simpson* v. *United States*, 435 U.S. 6 (1978), and *Jeffers* v. *United States*, 432 U.S. 137 (1977), that "the double jeopardy clause prevents giving effect to the legislative intent to twice punish the 'same offense' * * *." 593 S.W.2d at 215. Accordingly, the court concluded: "Our determination that the description of the offense of armed criminal action includes all of the elements of the underlying felony requires that the [armed criminal action] statute be construed as if [the provision requiring imposition of a sentence in addition to that imposed for the underlying felony] were stricken * * * since the double jeopardy clause prohibits imposing punishment for both armed criminal action and for the underlying felony." *Id.* at 223 (footnote omitted).[1]

Following a remand by this Court for reconsideration of *Sours I* in light of *Whalen* v. *United States*, 445 U.S. 684 (1980), the Missouri Supreme Court, in *Sours II*, adhered to its previous ruling. It observed that in *Whalen* this Court held only that Congress did not authorize consecutive sentences for felony murder and the underlying felony, and that the Court "ex-

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[1] The decisions of the Missouri courts in *Sours I* and subsequent cases clearly rest on the Double Jeopardy Clause of the Fifth Amendment, which is applicable to the states through the Fourteenth Amendment (*Benton* v. *Maryland*, 395 U.S. 784, 794 (1969)). See 593 S.W.2d at 211. The court noted in *Sours I* that the double jeopardy provision of the Missouri Constitution was not applicable because it prohibits only retrial of a defendant for the same offense after acquittal by a jury and does not address the question of multiple punishments. 593 S.W.2d at 210-211.

pressly reserved the question whether, had Congress clearly intended to impose multiple punishments for the same offense, the imposition of such punishment would violate the double jeopardy clause." 603 S.W.2d at 594. The court in *Sours II* reaffirmed its ruling that armed criminal action and the underlying felony are the "same offense" and that the Double Jeopardy Clause bars separately punishing a defendant for both offenses, notwithstanding the acknowledged intent of the legislature to impose two separate punishments. The effect of a contrary holding, according to the Missouri court, "would be that the double jeopardy clause would hereafter be only a limitation on the executive and judicial branches, but not on the legislative branch of government." 603 S.W.2d at 606.

In *State* v. *Haggard*, *supra*, the Missouri Supreme Court reexamined its decisions in *Sours I* and *Sours II* in light of this Court's decision in *Albernaz* v. *United States*, 450 U.S. 333 (1981). The court distinguished *Albernaz* on the ground that, unlike its own cases involving armed criminal action and an underlying felony, *Albernaz* involved two offenses each of which required "proof of an element different from and not included in the other." 619 S.W.2d at 50. The Missouri court noted that this Court had "tacitly, if not in fact, sustained our position as stated in *Sours II*" by denying the State's petition for certiorari in that case. *Id.* at 51. Accordingly, the court held that although the Missouri legislature had intended to punish the defendant separately for violating both the robbery and armed criminal action statutes, "such multiple punishments for the same offense arising out of the same transaction violates the Fifth Amendment to the United States Constitution." *Ibid.*

SUMMARY OF ARGUMENT

Although the Double Jeopardy Clause has been said to prohibit "multiple punishments" for the "same offense," it has never been applied by this Court to invalidate a statutory scheme authorizing separate sentences for two offenses arising from a single act or transaction. In this case and in numerous other cases, however, the Missouri courts have concluded that the Clause bars the legislature from imposing separate punishments for two statutory offenses unless the legislature also defines those offenses in such a way that each offense "requires proof of a fact which the other does not" under the test established in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). In our view, the approach of the Missouri courts trivializes the Double Jeopardy Clause by permitting the legislature to achieve a concededly legitimate result only if it does so by jumping through certain prescribed hoops.

Assuming arguendo that armed criminal action and its underlying offense amount to the "same offense" under the *Blockburger* test, that fact alone is not, as the Missouri courts have assumed, dispositive of the double jeopardy question presented here. The question remains whether a defendant such as respondent has in fact been subjected to "multiple punishments" for the same offense and, if so, whether the Double Jeopardy Clause prohibits such a result even when the result is expressly authorized by the legislature.

1. Respondent was sentenced to concurrent terms of 15 and ten years' imprisonment for armed criminal action and the underlying felony (robbery in the first degree); thus, the effect is the same as if respondent had received only a single 15-year sentence. Moreover, Missouri law does not provide any limit on

the length of the sentences that may be imposed for either of those offenses. Because respondent's concurrent sentences are well within the range of what he could have received under either statute, no question of multiple punishments is even presented in this case.

2. In any event, the Double Jeopardy Clause does not bar the legislature from authorizing the imposition of multiple punishments for the same offense. Indeed, the Clause places no restriction whatever on the power of the legislature to define crimes and fix punishments. See *Whalen* v. *United States*, 445 U.S. 684, 689 (1980). Thus, as this Court has recently explained:

> [T]he question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution.

Albernaz v. *United States*, 450 U.S. 333, 344 (1981).

Here, the Missouri courts conceded that the state legislature intended to prescribe separate punishments for armed criminal action and the underlying offense. The courts concluded, however, that the Double Jeopardy Clause prohibits the fulfillment of this legislative mandate because armed criminal action and its underlying offense constitute greater and lesser included offenses under the *Blockburger* test. But in the multiple punishment context, the *Blockburger* test is merely a rule of statutory construction and "should not be controlling where, for example, there is a clear indication of contrary legislative intent." *Albernaz* v. *United States*, *supra*, 450 U.S. at

340. If, as this the Court stated in *Albernaz*, the constitutional question is one of ascertaining legislative intent, then the courts should be free to carry out the legislature's express intent to punish separately greater and lesser included offenses.

ARGUMENT

THE DOUBLE JEOPARDY CLAUSE DOES NOT BAR THE LEGISLATURE FROM AUTHORIZING THE IMPOSITION OF "MULTIPLE" PUNISHMENTS FOR THE "SAME OFFENSE"

The Missouri Supreme Court, in the decisions relied upon by the court below, has erred in concluding that the Double Jeopardy Clause prohibits the courts from carrying out the express intent of the legislature to impose separate punishments for armed criminal action and the underlying felony. In the view of the Missouri courts, the legislature's intent must be disregarded because the elements of armed criminal action and its underlying offenses are not sufficiently distinct to satisfy the test established in *Blockburger* v. *United States*, 284 U.S. 299 (1932). We believe that the approach of the Missouri courts is based on an erroneous view of the Double Jeopardy Clause.

1. The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." Ever since *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), this deceptively simple language has been understood as protecting not only against a second trial for the same offense but also "against multiple punishments for the same offense." *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969) (footnote omitted). The fact remains, however, that this Court has never invoked the double jeopardy guarantee to invalidate a statutory

scheme providing for the imposition of separate sentences in a single proceeding for violations of two or more statutory provisions arising from a single act or transaction. Nevertheless, purporting to rely on the decisions of this Court, the Missouri Supreme Court has struck down that portion of the armed criminal action statute that requires the trial judge to impose a separate sentence for armed criminal action in addition to that imposed for an underlying felony, on the theory that under the so-called "*Blockburger* test" the two statutory offenses constitute the "same offense" for double jeopardy purposes.

In *Blockburger*, this Court held that a statute prohibiting the sale of certain drugs not in the original package and another statute barring the sale of the same drugs not pursuant to a written order of the purchaser defined separate offenses, thus permitting the imposition of separate and cumulative penalties under the two statutes even though both offenses arose from the same sale. The Court stated (284 U.S. at 304):

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

The *Blockburger* test has been applied by this Court to determine "whether two offenses are the same for purposes of barring successive prosecutions" (*Illinois* v. *Vitale*, 447 U.S. 410, 416 (1980)) and also as "a rule of statutory construction * * * to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively." *Whalen* v. *United States*, 445 U.S. 684, 691

(1980) (footnote omitted). See *Albernaz* v. *United States*, 450 U.S. 333, 337 (1981). This case concerns application of the test only in the multiple punishment context, where, as the Court explained in *Whalen* (445 U.S. at 691-692), "[t]he assumption underlying the rule is that Congress ordinarily does not intend to punish the same offense under two different statutes. Accordingly, where two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent."

Petitioner appears to concede, and for purposes of this case we will assume, that the two statutory provisions involved here—armed criminal action and the underlying offense of robbery in the first degree—define greater and lesser-included offenses and thus are the "same offense" under the *Blockburger* test.[2]

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[2] In *Whalen* this Court concluded that rape and felony murder predicated on that rape are the "same offense" under *Blockburger* and the particular applicable provisions of the D.C. Code because "[a] conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape." 445 U.S. at 693-694. We question the value of the *Blockburger* test in determining whether two statutory offenses constitute the "same offense" where the offenses are not traditional greater and lesser included offenses but rather stand in relationship to each other as "compound" and "predicate" offenses. See *Whalen, supra*, 445 U.S. at 708-711 (Rehnquist, J., dissenting). Where such offenses are involved, we believe that the courts must do more than simply focus on the statutory elements in order to ascertain the intent of the legislature with regard to punishment. The ultimate point of the inquiry is whether the legislature intended the compound offense to function as an aggravated form of its predicates, in which case the punishment for the compound offense would encompass the entire course of conduct embodied in that

The Missouri courts treated this determination as dispositive of the question whether the Constitution permits separate punishments to be imposed for vio-

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offense, or whether, on the other hand, the legislature meant the compound offense to serve as an enhancement device by providing, apart from the punishment for the predicate offense, a separate punishment for the additional elements of criminality contained in the compound offense.

One way of ascertaining the legislature's intent in this regard is to compare the punishment schemes of the compound and predicate offenses. Where the punishment authorized for the compound offense is invariably greater than that for the predicate offenses, it may be reasonable to assume that the legislature intended the punishment for the compound offense completely to supplant the punishment for its predicates. In the case of traditional greater and lesser included offenses, such as armed robbery and robbery or assault with a weapon and simple assault, the legislature ordinarily prescribes a more severe punishment for the aggravated offense. Compare 18 U.S.C. 2113(a) (bank robbery punishable by up to 20 years' imprisonment and $5,000 fine) with 18 U.S.C. 2113(d) (armed bank robbery punishable by up to 25 years' imprisonment and $10,000 fine); see also 18 U.S.C. 111 (simple assault punishable by not more than three years' imprisonment and $5,000 fine; assault with a weapon punishable by not more than 10 years' imprisonment and $10,000 fine). Similarly, the District of Columbia offense of felony murder at issue in *Whalen* invariably carried a more severe sentence than its underlying offenses (compare, *e.g.*, D.C. Code Ann. § 22-2404 (1973) (first degree murder, which includes felony murder, punishable by 20 years to life) with D.C. Code Ann. § 22-2801 (1973) (rape punishable by any term of years or life)), thus permitting a rational inference that the legislature intended the punishment for the greater to include the punishment for the lesser offense.

By way of contrast, the punishment authorized by the Missouri legislature for armed criminal action is not invariably greater than that for its predicates such as robbery in the first degree. On the contrary, while a defendant may be sentenced to life imprisonment for either offense (see page 15 & note 4, *infra*), the minimum punishment for

lations of both statutes arising from the same act or transaction. In our view, however, this determination is merely the starting point for the necessary constitutional analysis. The question remains whether respondent has been subjected to "multiple punishments" for the same offense and, if so, whether the Double Jeopardy Clause prohibits such a result even where it clearly has been authorized by the legislature.[8]

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robbery in the first degree is five years' imprisonment (Mo. Stat. Ann. App. § 560.135 (Vernon 1979)), whereas the minimum punishment for one convicted for the first time of armed criminal action is only three years' imprisonment (Mo. Stat. Ann. App. § 559.225 (Vernon 1979)). Thus, the sentence for first degree robbery (five years to life), which under the Missouri courts' *Blockburger* analysis is the lesser included offense, exceeds that for the "greater" offense of armed criminal action (three years to life). We note, in this regard, that in the federal system there is a similar relationship between 18 U.S.C. (Supp. IV) 924(c), the federal equivalent of armed criminal action, and its underlying offenses: the maximum punishment authorized for the underlying offenses will often exceed that for the Section 924(c) offense. Compare, *e.g.*, 18 U.S.C. (& Supp. IV) 1201 (kidnapping punishable by imprisonment for any term of years or for life) with 18 U.S.C. (Supp. IV) 924(c) (first offender punishable by imprisonment for no less than one year and no more than ten years). Accordingly, whatever purpose the *Blockburger* test may serve in the case of such offenses as felony murder and rape, it has no useful function in the case of a sentence enhancement scheme, where, as is true of armed criminal action and 18 U.S.C. (Supp. IV) 924(c), it is apparent that the legislature has sought to impose an *additional* punishment on those who commit crimes through socially undesirable means.

[8] While we believe, as argued below, that the legislature is free to punish "twice" for the same element of misconduct under two statutes, we note that this is not such a case. Use of a dangerous weapon, though adverted to in Mo. Stat. Ann. App. § 560.135 (Vernon 1979), is not in fact an element of

2. Respondent was sentenced to concurrent terms of 15 years' imprisonment for the armed criminal action conviction and ten years' imprisonment for the first degree robbery conviction.[4] Because of the concurrent nature of the sentences, it is our understanding that under Missouri law the effect is the same as if respondent had received a single 15-year sentence. Furthermore, the Missouri robbery and armed criminal action statutes provide only that a convicted defendant must be sentenced to at least five and three years' imprisonment, respectively; neither statute sets a ceiling on the length of the prison sentence that may be imposed. Thus, a defendant could be sentenced under either statute to life imprisonment.[5] Because respondent's concurrent sentences are well within the range of what he could have received under either statute standing alone, we find it difficult to understand what led the court below to conclude that respondent had been subjected to multiple punishments. Respondent's situation is markedly different from that of the defendants in *Whalen* and *Albernaz*, whose cumulative punishments unquestionably were "multiple" in the sense that they were ex-

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first degree robbery in Missouri. The punishment proscribed for the offense is the same whether or not such a weapon is used. In this respect, the case differs from *Simpson* v. *United States*, 435 U.S. 6 (1978), in which the defendant arguably was being twice punished for the same use of a firearm.

[4] The Missouri courts apparently have construed the armed criminal action statute as reflecting a legislative intention to permit the trial courts to impose sentences for armed criminal action either concurrently or consecutively to the sentences imposed for the underlying felony. See *Sours I*, *supra*, 593 S.W.2d at 210.

[5] Indeed, in this case the trial judge so instructed the jury (see J.A. 4, 5), which, under Missouri law, was obligated to assess respondent's punishment.

posed to greater punishment than they could have been had they received the maximum sentence permitted for either statutory offense. Here, in contrast, no question of multiple punishments is even presented.[6]

3. Even if this case is treated as involving the imposition of "multiple punishments" for what, under *Blockburger*, amounts to the "same offense," the court below erred in concluding that the Double Jeopardy Clause prohibits such a result when the result is expressly authorized by the legislature. It is by now well established that the Double Jeopardy Clause does not restrict the power of the legislature to define crimes and fix punishments. See *Whalen*, *supra*, 445 U.S. at 689; *Sanabria* v. *United States*, 437 U.S. 54, 69 (1979); *Brown* v. *Ohio*, 432 U.S. 161, 165 (1977).[7] Instead, where separate sentences are imposed in a single proceeding, the role of the double jeopardy guarantee is limited to assuring that the courts do not exceed the legislative mandate in imposing sentence. *Ibid.* As the Court explained in *Whalen* (445 U.S. at 688; emphasis in original):

> It is not at all uncommon, for example, for Congress or a state legislature to provide that

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[6] We note that in the federal system no multiple punishment question is presented when a defendant uses a firearm to commit an offense that has its own sentence enhancement provision for using a firearm (*e.g.*, 18 U.S.C. 111, 2113), even though use of a firearm in the commission of a federal felony is also proscribed by a separate statute, 18 U.S.C. (Supp. IV) 924(c). In *Busic* v. *United States*, 446 U.S. 398 (1980), and *Simpson* v. *United States*, *supra*, this Court held that Congress did not authorize enhanced sentencing under Section 924(c) where the predicate felony statute contains its own enhancement provision.

[7] Other provisions of the Constitution circumscribe this power to some extent. See *Whalen*, *supra*, 445 U.S. at 689 n.3.

> a single criminal offense may be punished both by a monetary fine and by a term of imprisonment. In that situation, it could not be seriously argued that the imposition of both a fine and a prison sentence in accordance with such a provision constituted an impermissible punishment. But if a penal statute instead provided for a fine *or* a term of imprisonment upon conviction, a court could not impose both punishments without running afoul of the double jeopardy guarantee of the Constitution.

The limited scope of the double jeopardy protection against multiple punishment was underscored recently in *Albernaz* v. *United States*, *supra*, 450 U.S. at 344, where the Court stated that "the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution."

Despite this unambiguous language, the Missouri Supreme Court has indicated that, until this Court "declares clearly and unequivocally that the Double Jeopardy Clause * * * does not apply to the legislative branch of government," it will continue to invalidate sentences imposed for armed criminal action where the defendant also has been sentenced for the underlying felony. *State* v. *Haggard*, *supra*, 619 S.W.2d at 51. The approach of the Missouri Supreme Court trivializes the Double Jeopardy Clause by elevating form over substance and permitting the legislature to achieve a concededly legitimate result only if it does so by jumping through certain prescribed hoops.

The prohibition against multiple punishments for the same offense embodied in the Double Jeopardy

Clause is, after all, a limitation not on the legislature but on the power of the courts in imposing sentence. The legislature, by exercising its power to define criminal offenses, may, free of any restraints imposed by the Double Jeopardy Clause, "punish[] separately each step leading to the consummation of a transaction * * * and punish[] also the completed transaction." *Albrecht* v. *United States*, 273 U.S. 1, 11 (1927). The Clause does not grant the courts a license to frustrate the legislative intent merely because the expression of that intent fails to satisfy an arbitrary linguistic standard. To the extent that the decisions of the Missouri courts assume "that any particular criminal transaction is made up of a determinable number of constitutional atoms that the legislature cannot further subdivide into separate offenses, 'it demands more of the Double Jeopardy Clause than it is capable of supplying.'" *Whalen*, *supra*, 445 U.S. at 701 (Rehnquist, J., dissenting), quoting Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup. Ct. Rev. 81, 113. See Comment, *Twice in Jeopardy*, 75 Yale L.J. 262, 311-313 (1965).

The error in the approach of the Missouri courts can be illustrated by considering the following examples. Suppose a legislature enacted a statute providing that "whoever is convicted of crime X shall be punished by 10 years in prison, and then shall be punished again by another five years in prison, and then shall be punished a third time by paying a fine of $1,000." The operative effect of such a statute would be identical to that of one providing that "whoever is convicted of crime X shall be punished by 15 years in prison and a fine of $1,000." The former language is simply an eccentric way of stating what is more conventionally stated by the latter language.

See Comment, *Twice in Jeopardy*, *supra*, at 302. Thus, a defendant who has been convicted of crime X and sentenced to a total of 15 years' imprisonment and a $1,000 fine pursuant to the former provision has no double jeopardy argument, despite the fact that he literally has been punished three times for the "same offense" of committing crime X. Cf. *Gore* v. *United States*, 357 U.S. 386, 391-392 (1958).

From this point it requires little elaboration to conclude that a legislature could provide that whoever commits crime X shall be punished by 10 years in prison and an additional five years for commiting crime Y, where crime X is a lesser included offense of crime Y. To argue that crimes X and Y are the "same offense" under the *Blockburger* test would gain the defendant nothing when it came time for sentencing, for it would be perfectly clear that the legislature intended to punish the commission of the greater offense by adding five years to the sentence imposed for the lesser included offense. Indeed, the same would be true even if the legislature prescribed a punishment for the greater offense and then provided for more severe punishment for the lesser included offense, as the Missouri courts in effect concluded was done here (see note 2, *supra*). In any of these cases, the fact would remain that the legislature, in carrying out its duty to define offenses and ordain punishment, had provided a certain punishment for those who committed both crime X and crime Y. Nothing in the Double Jeopardy Clause prohibits the legislature from carrying out its duty in this fashion.

Of course, legislatures do not normally provide criminal penalties in such circumlocutory fashion. Instead of providing a 10-year prison term followed by a five-year prison term, they normally provide

simply a 15-year term.[8] But a legislature's normative practice is beside the point, which is simply that, when a claim is made, as it is here, that a defendant has been sentenced to multiple punishments in violation of the Double Jeopardy Clause, such a claim cannot be decided merely by concluding that the offenses for which the defendant stands separately punished might be the "same offense" under the test established in *Blockburger*. The legislature is free to punish the offense or offenses in a variety of ways, and if the sentence imposed does not exceed what the legislature has authorized, the defendant has received all the protection the Double Jeopardy Clause affords.

By holding that the *Blockburger* test provides a substantive standard that governs the constitutionality of multiple punishments, the Missouri courts have ignored the teaching of *Albernaz* that "the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed." 450 U.S. at 344. In answering those questions, the *Blockburger* test is merely a rule of statutory construction and "should not be controlling where, for example, there is a clear indication of contrary legislative intent." 450 U.S. at 340. See also

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[8] In the case of Missouri's armed criminal action statute, it is perfectly logical for the legislature to have dealt with the use of dangerous weapons in the commission of other offenses by means of a single statute authorizing additional punishment, rather than by amending every felony statute on the books to the same end. This fact suggests to us the questionable validity of treating the armed criminal action prohibition and the predicate felony as being the "same" under the *Blockburger* test, since the legislative scheme contrasts sharply in its basic structure with the traditional format for specifying greater and lesser included offenses. See note 2, *supra*.

Whalen, supra, 445 U.S. at 693 (emphasis added): "[W]here the offenses are the same under that test, cumulative sentences are not permitted, *unless elsewhere specially authorized by Congress.*" To hold that legislative intent, no matter how clearly expressed, will be ignored unless it conforms to the *Blockburger* test would unjustifiably stand the *Blockburger* test on its head. It is one thing to hold, as did *Blockburger*, that the presence of distinct statutory elements demonstrates a legislative intent to allow cumulative punishment; it is quite another to use the distinct-offense test of *Blockburger* to thwart legislative intent, and this Court has never done so.[9]

Furthermore, we note that the Missouri courts have never questioned the power of the legislature to provide for enhanced sentencing of a defendant who uses a firearm in the commission of a felony. See *State* v. *Kane*, 629 S.W.2d 372, 377 (1982), petition for cert. pending, No. 81-2117 (filed May 7, 1982). Thus, if the legislature, instead of creating a separate armed criminal action offense, had merely provided for imposition of an additional penalty on those defendants who used firearms in the commission of a felony, even the Missouri courts would concede that there was no double jeopardy problem. Because the legislature has created two statutory offenses that do not meet the requirements of the *Blockburger* test, however, the Missouri courts have held that additional punishment for using a firearm is not permitted.

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[9] In *State* v. *Haggard, supra*, 619 S.W.2d at 51, the Missouri Supreme Court relied on this Court's denial of certiorari in *Sours II* as support for its double jeopardy analysis. This reliance was improper. See, *e.g.*, *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 366 n.1 (1973); *Agoston* v. *Pennsylvania*, 340 U.S. 844 (1950) (opinion of Frankfurter, J.).

But if the legislature could have accomplished the same result through an enhanced sentencing provision, it should be permitted, if it chooses, to create a separate armed criminal action offense, since the effect and purpose are precisely the same as those of an enhanced sentencing scheme. The Missouri courts simply fail to acknowledge the independent role of the legislature in defining conduct as criminal and in determining appropriate sentences. If the enhanced sentence statute is constitutional, it is because the legislative intent to provide for an additional penalty renders inapplicable any independent constitutional policy against multiple punishment. And if, as the Court has stated in *Albernaz*, the constitutional question is one of ascertaining legislative intent, then the legislature should be free to express its intent to punish separately greater and lesser included offenses.

CONCLUSION

The judgment of the Missouri Court of Appeals should be reversed.

Respectfully submitted.

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Docket Sheet

NO. 81-1214-CSY	TITLE Missouri, Petitioner v. Danny Hunter

DOCKETED	COURT
Dec. 30, 1981	Court of Appeals of Missouri, Western District

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Philip M. Koppe
	Counsel for Respondent: James W. Fletcher
Dec. 30, 1981	Petition for writ of certiorari filed. (Record filed).
Jan. 25, 1982	Motion of respondent for leave to proceed in forma pauperi and brief in opposition filed.
Jan. 27, 1982	DISTRIBUTED. 2-19. (Stricken)
March 17, 1982	DISTRIBUTED. 4-2.
Apr. 5, 1982	The motion of respondent for leave to proceed in forma pauperis is GRANTED. Petition GRANTED.

May 14, 1982	Order extending time to file the joint appendix and petitioner's brief on the merits until June 19, 1982.
May 19, 1982	Order extending time to file the respondent's brief on the merits until August 11, 1982.
June 1, 1982	Brief, amicus curiae, of Wayne County Prosecutor's Office in support of petition filed.
June 21, 1982	Order further extending time to file the petitioner's brief on the merits until July 3, 1982.
June 23, 1982	Joint appendix filed.
July 6, 1982	Brief for the petitioner filed.
July 9, 1982	Brief for the U. S. as amicus curiae filed.
Aug. 11, 1982	Brief for the respondent filed.
Aug. 13, 1982	Application for leave to file respondent's brief on the merits in excess of the page limitations and order granting same on August 13, 1982 by Blackmun, J. Brief not to exceed 55 pages.
Sept. 3, 1982	CIRCULATED.
Nov. 10, 1982	ARGUED.